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William B Calhoun Esq &c

7.

CASE

OF

THE PROPRIETORS

OF

CHARLES RIVER BRIDGE

AGAINST

THE PROPRIETORS

OF

WARREN BRIDGE,

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

BY OCTAVIUS PICKERING,

COUNSELLOR AT LAW.

BOSTON:

HILLIARD, GRAY, LITTLE, AND WILKINS.

1830.

CAMBRIDGE:
E. W. METCALF AND COMPANY.

REPORT.

The Proprietors of Charles River Bridge
against
The Proprietors of Warren Bridge and others.

Filing and opening in the clerk's office a deposition taken in a suit in chancery, is equivalent to a publication in the English practice.

Notice that a suit in chancery is brought to an issue being given by the plaintiff thirty days before the ensuing term, the case will stand for a hearing at such term in its order on the docket, like cases at law; the English rules in chancery relative to setting down a case for hearing not having been adopted by this Court.

Whether suits in chancery are embraced by the exception in the 15th article of the declaration of rights, which article provides, "that in all controversies concerning property, and in all suits between two or more persons, *except* in cases in which it has heretofore been otherwise used and practised, the parties have a right to a trial by a jury," *quære.*

But if a party to a suit in chancery has, by virtue of that article, a right to a trial by jury, it is only in regard to controverted facts deemed essential to the fair and full trial of the case; and whether a fact proposed to be so tried is essential or not, is to be determined by the Court.

If, upon inspecting the pleadings, it appears that important facts are asserted and denied, the Court, in its discretion, may direct issues before a hearing.

Where the legislature passed an act granting additional privileges to a bridge corporation, and providing, "that in consideration of the privileges so granted the corporation shall relinquish the additional toll on the Lord's day, from and after the passing of this act," it was *held*, that this relinquishment was a condition subsequent, the non-performance of which was a matter between the government and the corporation only, and could not be taken advantage of by a stranger to invalidate the grant.

If a corporation obtain an extension of their charter by false and colourable representations to the legislature, it may be made the ground of a *quo warranto*, but a stranger cannot take advantage of the fraud to deny the validity of such extension.

The government of the colony of Massachusetts having established a ferry between Boston and Charlestown, over Charles river, recite, in an ordinance to which are affixed the dates of 1636, 1640 and 1642, that they have given "the *revenue* of the ferry" to Harvard College. At a general court in 1640, "*the ferry* between Boston and Charlestown is granted to the college." The ferry was at that time under lease. In May 1650 the college was incorporated. In October following, in an-

swer to the petition of the president of the college in regard to "rectifying the *ferry rent*, which belongs to the college, it is ordered that it shall be in the liberty and power of the president, in behalf and for the behoof of the college, to dispose of the ferry by lease, or otherwise, making the best and most advantage thereof to his own content." In an order of 1654 it is said, "besides the *profit* of the ferry formerly granted to the college, which shall be continued, there shall be yearly levied by addition to the county rate, an hundred pounds, to be paid to the college treasurer, and this to continue during the pleasure of the country." From 1639 to 1785 the college received the profits of the ferry; which, during part of the time from 1650, was under their own management, and for the rest of the time since that year was leased by them to tenants. The rates of toll were fixed by the college, but the legislature passed acts from time to time for regulating the ferry, in some instances affecting the toll, sometimes consulting and sometimes without consulting the college. By *St.* 1784, *c.* 53, (passed March 9, 1785,) entitled, "An act for incorporating certain persons for the purpose of building a bridge, over Charles river, between Boston and Charlestown," the persons incorporated were authorized to erect the bridge "in the place where the ferry between Boston and Charlestown is now kept," and to receive toll for forty years from the day on which the bridge should be opened for passengers; double toll to be paid on the Lord's day. During that term the corporation were to pay the college an annuity of 200*l.*, and at the end of the term the bridge was to "revert to and be the property of the commonwealth, saving to the college a reasonable and annual compensation for the annual income of the ferry, which they might have received, had not said bridge been erected." The bridge was opened for passengers on June 17, 1786. The college made no conveyance of the ferry by deed to the bridge corporation, but the annuity was paid by that corporation and received by the college. In 1792, on an application for authority to build a bridge across the same river between Boston and Cambridge, a committee of the legislature reported, that the statute of 1784 was not "an exclusive grant of the right to build over the waters of that river;" which report was accepted, and certain individuals were by *St.* 1791, *c.* 62, (passed March 9, 1792,) incorporated for the purpose of building the West Boston bridge, between Boston and Cambridge, with authority to receive toll for forty years and with the obligation to pay an annuity to the college: and "whereas the erection of Charles river bridge was a work of hazard and public utility," and the West Boston bridge might "diminish the emoluments of Charles river bridge, therefore, for the encouragement of enterprise," it was enacted that the privileges and duties of the proprietors of Charles river bridge should continue thirty years longer, and that in consideration of the privileges in this act granted, they should relinquish the additional toll on the Lord's day, from and after the passing of this act. Soon afterward the proprietors of Charles river bridge ceased to demand the additional toll, and it has not been exacted since, and in 1802 they ordered such parts of the statute of 1791 as concerned them, to be entered on their records; but they did not pass any express vote to accept the act until February 1826, a few months before the expiration of the term of their original charter. They have ever since continued to comply with the provisions of the two statutes. In 1828 (by *St.* 1827, *c.* 127,) the legislature incorporated certain persons for the purpose of building the Warren Bridge across the same river, between Boston and Charlestown. This bridge was built in pursuance of the act, near to Charles river bridge, the distance between them on the Charlestown shore being 260 feet and on the Boston shore 915 feet, and in consequence nearly two thirds of the toll were diverted from Charles river bridge. The act of 1827 provided that the Warren bridge corporation should make compensa-

tion to any person or corporation whose *real* estate should be *taken* for the use of the bridge, but was silent in regard to damage of any other kind. It was *held* :—

By *Morton* J., that by virtue of the grants relating to the ferry and the practical construction of them, the college had a permanent indefeasible interest in the ferry, subject to the regulation of the government ;—by *Putnam* J., that the college were seised in fee of the franchise ; and by *Parker* C. J., that the grants before 1650 did not vest in the college the absolute property in the ferry itself, but only a permanent right to the profits, the government being at first trustees of the ferry for the benefit of the college ; and the trust being afterwards relinquished, the college thus became the owners of the ferry, subject to the regulation of the government :—

By *Parker* C. J., *Wilde* J. and *Morton* J., that the right of the college was not transferred to the proprietors of Charles river bridge ;—but by *Wilde* J., that by the statute of 1784 and the acquiescence of the college, the ferry was extinguished ;—and by *Morton* J., that the public exigencies requiring it, the government seized the college right, (after providing a suitable indemnity,) to enable them to make a compact by which the public wants might be satisfied ;—but by *Putnam* J., that the college, for a valuable consideration paid by the proprietors of the bridge, consented that they should have the ferry during the continuance of their charter :—

By *Putnam* J., that no other ferry could be lawfully erected by the government, or by an individual, so near to the old ferry as to draw away its custom, and that a ferry set up at the place where Warren bridge is built, would have been so near as to be a nuisance to the old ferry ;—by *Parker* C. J., that the grant was not of an exclusive right along the whole opposite shores of Boston and Charlestown, neither was it limited to the ferry-ways, but it gave a right to receive toll from all persons, who, having occasion to pass between Boston and Charlestown over the river, would in the usual course of travel cross at this ferry ; but that the government had a right, whenever the increase of population should require it, to establish another ferry between the two towns, only providing for a just compensation to the proprietors of the old ferry according to the value of the property at the time : in order however to give the owner of an old ferry a claim to compensation, the new one must not merely be so near as to take away some of the custom ; it must be near in a positive sense ; it must be within the range of the exclusive right of the old one ; which is to be settled, in the case of a prescriptive ferry, by proof of use, and where a grant exists, by the terms of the grant :—

By *Parker* C. J. and *Wilde* J., that when the legislature authorize the establishment of a bridge or ferry near an old one, this is not a taking of private property for public uses, within the meaning of the 10th article of the declaration of rights or the fifth amendment to the constitution of the United States, (which provide respectively that private property shall not be "appropriated" or "taken" for public use, without compensation,) as the damages are only consequential ; but by *Parker* C. J., by the principles of our constitution and the nature of our government, the legislature are prohibited from making a grant to the necessary and essential injury of a pre-existing grant, without providing for a just compensation :—

By *Parker* C. J. and *Wilde* J., that the express acceptance by the proprietors of Charles river bridge, of the statute of 1791, was in due season, it being before the expiration of their original charter and before the grant to the proprietors of the Warren bridge ; and further, that their acceptance might be presumed from their previous proceedings and from the statute's being to their benefit :—

By *Parker* C. J., that the ceasing, soon after the enactment of the statute of 1791, to

take the additional toll and never exacting it since, was a sufficient relinquishment of it, without any express vote :—

By *Morton* J., that the contract between the legislature and the proprietors of Charles river bridge contains no grant, express or implied, of an exclusive right beyond the limits of the bridge itself, but their right extends only to taking toll of such persons as may choose to pass the bridge ; so that the statute of 1827 is not contrary, either to the constitution of this commonwealth, as taking private property for public use without compensation, or to that of the United States, as impairing the obligation of a contract :—

By *Wilde* J., that the proprietors of Charles river bridge did not derive, expressly or by implication, from the statutes of 1784 and 1791, especially the latter, an exclusive right of transportation over the river between Boston and Charlestown ; and that the statute of 1827 was not repugnant to the declaration of rights, for no property of those proprietors was taken, the damages sustained by them being only consequential, and was not inconsistent with their rights under the statutes of 1784 and 1791, and so was not contrary to the constitution of the United States :—

By *Putnam* J., that the proprietors of Charles river bridge having acquired the right of the college to the ferry, did, by virtue of the acts of 1784 and 1791, become seised of an exclusive franchise for transportation over Charles river between Boston and Charlestown over their bridge, as extensive as the owners of the ferry had enjoyed for transportation in boats, so that a new ferry or bridge which would have been a nuisance to the old ferry, would be a nuisance to the old bridge ; that independent of the ferry, the statutes authorizing the proprietors of Charles river bridge to erect a toll-bridge, contains an implied engagement on the part of the legislature, not to grant another bridge so near as to draw away the toll from the old one; and that the statute of 1827 is contrary to the constitution of the United States, inasmuch as it impairs the obligation of the grant previously made to the proprietors of Charles river bridge, and contrary to the constitution of this commonwealth, inasmuch as it takes away their property for public uses, against their consent, without compensation, and without provision for a trial by a jury :—

By *Parker* C. J., that the contract of the government with the proprietors of Charles river bridge was, that the grantees should have a right as extensive as the owners of the ferry had, to take toll from persons having occasion to pass between Boston and Charlestown, and that this right should not be disturbed or impaired, unless public necessity should demand it, and in such case the grantee should be indemnified ; and that the statute of 1827, in so far as it authorizes, and by its necessary operation occasions, a diversion of travel and toll from Charles river bridge, without providing for an indemnity, impairs the obligation of the contract with the proprietors, and is contrary to the constitution of the United States and to the principles of the constitution of this commonwealth.

This was a bill praying for an injunction to restrain the defendants from building a bridge, which they had begun to erect by virtue of an act of the legislature, and also from suffering passengers to go over the same. The facts alleged in the bill were as follows :—That the plaintiffs were made a corporation by an act passed March 9, 1785, and were authorized to erect a bridge over a navigable river, called Charles River, between Boston and Charlestown, at or near the place where

an ancient ferry was before kept; that the bridge was designed to accommodate all passengers of every description, during the term of forty years, on a certain line of travel leading to and from the southerly part of Charlestown from and to the northerly part of Boston, as delineated on a plan annexed to the bill; that by the same act, and for the purpose of reimbursing the money expended in building and supporting the bridge, the plaintiffs were authorized to take, for their sole benefit, certain tolls of all passengers, as specified in the act; which tolls were to continue forty years from the day of opening the bridge for passengers. That certain duties and obligations in favour of the public were imposed upon the plaintiffs; as that the bridge should be of certain dimensions and be lighted, as specified in the act, and that the draw should be lifted without any toll, for all vessels passing the same, except in certain cases otherwise provided for. That the proprietors should also pay annually to the President and Fellows of Harvard College, (who were alleged to be the former owners of the ferry,) 666 dollars 67 cents, during said term; at the end of which, the bridge should be left in good repair and revert to the commonwealth; saving to the college a reasonable annual compensation for the annual income of the ferry which they might have received, had not the bridge been built. That the plaintiffs accepted the act of incorporation according to its terms, and thereby a contract was created between the commonwealth and themselves conformably to the act. That the President and Fellows of Harvard College, before the passing of the act, had become and were the owners of the ancient ferry, exclusive of the right of any person or corporation to maintain a ferry or other permanent method of transporting by boats or otherwise, for hire or toll, any passengers, cattle or vehicles travelling to and from the southerly part of Charlestown from and to the northerly part of Boston; that no other ferry across the river was ever established or used for the travel of passengers between Boston and the opposite shore of the river; and, that the act of incorporation was passed with the consent of the President and Fellows of Harvard College; by means whereof the plaintiffs became the possessors and grantees of the President and Fellows in the ferry, during the

term of forty years, and entitled to the exclusive right of erecting a bridge over the river, for the use of all persons going upon the said line of travel, to the same extent and for the same purpose to which the right of the ancient ferry extended. That the plaintiffs, pursuant to their act of incorporation, built the bridge, and opened the same for passengers on the 17th of June 1786, and have ever since kept the same in good repair, and in all other respects have performed the duties which by the act were to be performed by them, and that the use of the ancient ferry, as the same was before used, has been discontinued. That by another statute of this commonwealth, of March 9, 1792, for incorporating certain persons to build West Boston bridge, so called, leading from West Boston to Cambridge, (which statute was passed with the consent of the President and Fellows of Harvard College,) it was, among other things, recited, that the bridge of the plaintiffs was a work of hazard and public utility, and that another bridge in the place then proposed for the West Boston bridge (which place was higher up the river, and distant from the plaintiffs' bridge about one mile, measuring on the Boston side of the river, and about two miles measuring on the opposite shore) might diminish the emoluments of the plaintiffs' bridge; therefore, for the encouragement of enterprize, it was, among other things, enacted, that the plaintiffs should continue a corporation as aforesaid for the further term of thirty years, in addition to their original term, making in the whole the term of seventy years, which will expire on the 17th of June 1856, at which period their bridge should revert to and be surrendered in good repair to the commonwealth; in consideration of which additional grant the plaintiffs should also relinquish the additional toll originally authorized to be taken by them on the Lord's day. That the plaintiffs did accordingly accept the terms offered them in the last mentioned act; by reason whereof they became entitled to the right of keeping their bridge for the additional term of thirty years, *to wit*, commencing the 17th of June 1826, exclusive of the right of any other person or corporation to erect any bridge for accommodating the same travel as above stated. That the last mentioned act went into operation, and immediately thereupon the plaintiffs relinquished the additional

toll on the Lord's day and have ever since forborne taking it; and have in all other respects complied with the terms of the two acts above mentioned. By reason of all which the plaintiffs are entitled to have, during the residue of the term of seventy years, the exclusive right of erecting and maintaining their bridge, &c. The plaintiffs also alleged, that the said corporation called "The Proprietors of the Warren Bridge" (under whose pretended authority the individuals named in this bill as combining with them will in any suit at law attempt to justify themselves) have no real or personal property or other funds to respond any damages which the plaintiffs might recover at law for any injury sustained by the erection of the Warren bridge, unless it be from assessments upon the respective proprietors, which assessments are restricted to the mere expenses attending the building of the same.

The bill then proceeds to aver, that the corporation called "The Proprietors of the Warren Bridge" created by an act passed on the 12th of March 1828, (*St.* 1827, *c.* 127,) together with certain other persons, *to wit*, John Skinner (and others named in the bill) and divers other persons to the plaintiffs unknown, combining and confederating together, deny and disregard the exclusive right of the plaintiffs, and openly threaten to erect another bridge over the same navigable river, for the passage of foot passengers and all others, with their cattle and carriages, upon and along the line of travel aforesaid, without payment to the plaintiffs of the tolls granted to them as aforesaid, and have, as the plaintiffs are informed and believe, commenced the building of the bridge, beginning the same at the distance of two hundred and sixty feet from the bridge of the plaintiffs on the Charlestown side of the river, and eight hundred and fifty two feet from the end of the plaintiffs' bridge on the Boston side thereof, and communicating by a highway laid out or intended to be laid out by the defendants from the Charlestown end of the Warren bridge to Charlestown square, with which square both of the bridges will communicate at the distance of about 390 feet from the respective terminations of the bridges on the Charlestown side. That all the travel of every kind, direct from Charlestown to Boston, which shall pass over the Warren bridge, must

as the highways now are and ever have been established, pass through or from Charlestown square, and must necessarily, if the Warren bridge were not erected, pass, as it always has heretofore, over the bridge of the plaintiffs, paying the tolls established as aforesaid; and that the only direct avenue from the Boston terminus of the Warren bridge to the business part of Boston is laid out over land newly made, upon which there is neither any dwelling-house or ware-house, store or other building for business, until this avenue meets one of the great or common avenues along which the travel over the plaintiffs' bridge has been accustomed to pass. That the bridge is about to be erected, by the Warren bridge corporation and John Skinner and others with the open and avowed purpose and intent of diverting the travel from the bridge of the plaintiffs as aforesaid; which will operate to their irreparable loss, detriment and injury, and in derogation of their lawfully vested exclusive rights as aforesaid, and so far as their said rights are concerned will be a nuisance.

The bill then further avers, that the proprietors of the Warren bridge and J. Skinner and others pretend, that they are duly authorized to build a bridge as aforesaid by virtue of a certain act, purporting to be a statute of the commonwealth, passed on the 12th day of March 1828, entitled "An act to establish the Warren Bridge Corporation," a copy of which is annexed, and which the plaintiffs pray may be taken as a part of their bill of complaint. Whereas the plaintiffs expressly charge, that the alleged statute, as it purports to grant a right to said corporation incompatible with and repugnant to the vested rights of the plaintiffs, did in so far, and in that respect does impair the obligation of the contract aforesaid between the commonwealth and the plaintiffs by which the said exclusive right was granted to the plaintiffs; and so being contrary to the constitution of the United States is utterly void, invalid and of no effect, and the authority supposed to be derived therefrom is wholly void and ineffectual. That the said proprietors and said J. Skinner and others do at other times give out and suggest, that on account of the increase of travel, the public necessity or convenience did require that another bridge should be erected, and therefore, notwithstanding

the right of the plaintiffs, the legislature at their discretion and for the public accommodation, had a right and were well warranted in passing the act aforesaid, and the authority derived from it to build said other bridge is a good and sufficient authority for that purpose; whereas the plaintiffs expressly charge, that the constitution of this commonwealth and the bill of rights thereof do so far restrain legislative power, that it cannot revoke or annul its own grant, or transfer or divest a legal vested right in individuals excepting only in those cases where the property of individuals is taken or appropriated for the public use; and that in such last case such property can only be taken or appropriated by some act which provides a just compensation therefor to the individuals from whom it is so taken; and further, that if the public necessity or convenience had required the erection of another bridge at the place aforesaid (which they wholly deny), such other bridge being to the detriment, diminution and destruction of the aforesaid rights of the plaintiffs, would have been a taking of private property for public uses, within the true meaning and intent of the constitution of the United States, and an appropriation of the property of individuals to public use within the true meaning and intent of the constitution of this commonwealth, which could not be constitutionally done by a statute of the commonwealth, without providing at the same time a reasonable compensation therefor; but neither by the supposed act nor by any other act or proceeding, did the legislature of the commonwealth provide for any compensation to the plaintiffs for their property so alleged to be taken and appropriated to the public use; and for this cause also the supposed act is void. And the plaintiffs further allege, that the proprietors of Warren bridge and J. Skinner and others do further sometimes give out and pretend, that although the said Charles river bridge is 42 feet wide, and wider than required by their act of incorporation, yet it is too narrow to accommodate the public travel on said line of travel; at other times, that the raising of the draw for the passage of vessels is an obstruction to the public travel, which might in some measure be relieved by the erection of another bridge nearly parallel thereto; at other times, that the avenue to said bridge on the Charlestown side is

too narrow for the travel leading thereto; and at other times, that the proposed bridge would accommodate passengers wishing to go to the westerly part of Boston from Charlestown square; whereas the plaintiffs, denying that their bridge is too narrow to accommodate the public travel, and that the erection of another bridge as last aforesaid would relieve the delay and inconvenience arising from the raising of the draw, and that the avenue leading to the bridge on the Charlestown side is inconveniently narrow, and that the erection of a new bridge in the place proposed would accommodate passengers from Charlestown square to the westerly part of Boston, other than a very few passengers, and them in a very slight degree, do expressly *charge*, that while the said act was under the consideration of the legislature and before the passing thereof, the plaintiffs did, by memorials addressed to the Senate and House of Representatives of this commonwealth, assert and make known their rights aforesaid and did protest against the granting of any authority to erect the new bridge; and did further expressly offer, at their own expense, if so authorized by the legislature, to make their own bridge sixty or eighty feet wide, and also, in order to relieve the delay and inconvenience occasioned by raising the draw thereof, did offer to construct at their own expense a circular draw thereto, so that travellers should not be delayed or impeded while vessels were actually passing through their bridge; and also, that they were willing to make the Charlestown avenue to their bridge of any width which the legislature might authorize; and also, if deemed expedient, to construct a spur bridge, leading from their bridge to a point at or near the spot where the proposed bridge of the defendants was to terminate on the Boston side; by means of which the impediments to navigation as well as other inconveniences would be avoided;—and also, that they would do any other matter or thing, even to the extent of building another bridge, in any way pertaining to the accommodation of the public, &c. And forasmuch as matters of this description are more properly cognizable and relievable in this Court sitting as a court of equity, and in regard that the plaintiffs have no mode of inquiry into, ascertaining and preventing the said nuisance, detriment and injury threatened and commenced

against their said exclusive rights set forth as aforesaid, but by the aid of this Court sitting as a court of equity ; now, to the end that the proprietors of the Warren bridge, and the said John Skinner and others may true and perfect answer make in the premises, &c. and that they and their agents and servants may forthwith be absolutely enjoined, restrained and prohibited from building or erecting or commencing or proceeding to build or erect the said bridge at the place aforesaid, &c.

The bill was filed on the 28th of June 1828, and a subpœna was prayed for, which was granted, and on the same day a motion was made for an immediate injunction to stay the further building and finishing of Warren bridge, until a hearing and final decision upon the bill and such answer as should be made thereto by the parties defendant. On this motion notice to the defendants was ordered, and the 5th of August assigned for a hearing ; on which day both parties appeared by their counsel, and were heard on the question, whether the injunction moved for should be granted. Certain affidavits and maps were read and exhibited by the plaintiffs in proof of the facts set forth in the bill. An immediate injunction was refused, for the reasons stated by the Court in Pickering's Reports, *vol.* 6, *p.* 393.

On November 1, 1828, (in vacation,) the defendants filed an answer to the bill.

In their answer, the defendants admit the enactment of the statute of 1784, *c.* 53, (passed March 9, 1785,) but they deny that the corporation thereby created were authorized to build a bridge near the ferry but were alone permitted to build one at the ferry ; and they deny that the plaintiffs' bridge was intended to accommodate all passengers of every description during the term of forty years on any particular line of travel. They admit, that by that statute it was provided, that for the purpose of reimbursing those proprietors the money which should be expended in building and supporting that bridge, a toll should be established at the rates set forth in the act, and that double toll should be taken on the Lord's day, but they deny that any duty or obligation was imposed by the act upon the proprietors, other than that the license given by the act to build the bridge would have been ineffectual without the performance of the conditions therein

provided ; or that any penalty is therein contained, other than that the act should be void if the bridge should not be completed within the term of three years. They admit that the bridge was built within that time, but they deny that the corporation accepted the act upon the terms and conditions as set forth in their bill ; or that a contract arose therefrom of the import and effect alleged by the plaintiffs. Not admitting that Harvard College possessed an exclusive right of ferry, and alleging that if it did, the general court could not have transferred the same to private persons or corporations, they say, that in 1631 the government of the colony of Massachusetts Bay, did, by an ordinance, establish a ferry between Boston and Charlestown, to be kept by and under the government, for the accommodation of the people; that in 1654 the general court passed an ordinance whereby it was declared, that the profit of the ferry, which had been before temporarily granted to the college, should be continued ; and they allege, that the ferry belonged to, and the rates of toll were subject to the regulation and control of the general court, for the public benefit; and that by various laws, passed from time to time, the general court did regulate the same and declare who should be exempt from toll, and how the ferry should be leased and managed. They deny that the statute of 1784 was passed with the consent of Harvard College, or that the college had knowledge thereof, or that any conveyance was made by the college to those proprietors, or that those proprietors became the successors or grantees of the college, of the ferry or of any such exclusive right as is alleged by the plaintiffs. They deny that those proprietors were entitled by the act of incorporation to the exclusive right and privilege of erecting and maintaining a bridge over the river for the passage of all persons, for toll, upon and along the line of travel as set forth by the plaintiffs ; and they allege, that if the act had contained any such exclusive right, it would have been void, as contravening the sixth article of the bill of rights, which declares that no man, nor corporation, has any other title to obtain advantages or particular or exclusive privileges distinct from those of the community, than what arises from the consideration of services rendered to the public ; and they allege, that Thomas

Russell and others, who petitioned for the act, had not then rendered to the public any services, nor is it averred in the bill that the act was founded upon the consideration of services rendered by them.

They further say, that from the time of the first settlement of the colony of Massachusetts Bay, the general courts thereof were invested by the colony and province charters, with the right of controlling the use of the sea-shore, arms of the sea and navigable waters, and of laying out all public roads, ferries, bridges, and ways for the encouragement and facility of commerce, shipping and trade; and of altering the same and increasing the number thereof, from time to time, as the convenience, safety and welfare of the people required, the better to accommodate the same travel which passed over roads, ferries and bridges previously established and would have continued so to pass if the new roads, &c. had not been established; and that this authority was exercised by the general courts, at their own mere motion, as well as on the petition of private persons; and that when petitions were made, the petitioners were heard either before the general court or their committee, and thereupon examination was had whether the exercise of their authority, as prayed for, would be to the convenience or detriment of the public; and on the reports made by the committees, the general court decided definitively upon such petitions; and they allege that such course of proceedings and inquiry had been used and practised upon, as well before the adoption of the constitution of this commonwealth, as since.

They say, that at the time when the act of 1784 was passed, there were and yet are navigable waters and an arm of the sea extending between Charlestown and Boston, and that Massachusetts, as a sovereign state, was and still is possessed of the exclusive right and ownership thereof; and that the regulation, use and management of the same for the public welfare are subject to the control of the legislature; that Russell and others subscribed to a fund for erecting a bridge across those waters, called Charles river, and in order that such bridge might not be deemed a public nuisance, applied by their petition to the legislature for permission to build it, representing that it would be

of great public utility; and at the same session of the legislature, John Cabot and Andrew Cabot also preferred a petition, showing that a bridge over Charles river, from Lechmere's Point in Cambridge to Barton's Point in Boston, and distant from the ferry about one half of a mile, would be essentially useful to the public, and offered to build the same at their own expense, they receiving a reasonable toll, and so soon as the sum which might be expended in building the bridge, and the interest thereof, should be repaid, to renounce all title to the bridge; that both petitions were referred to a committee of the legislature, who heard the parties, and made their report, that the petitioners for building a bridge at the ferry should have leave to bring in a bill for that purpose upon certain principles therein set forth; which petitions and report the defendants exhibit as a part of their answer. They further say, that the legislature thereupon granted a license to Russell and others to build a bridge in the place where the ferry was then kept, and for the purpose of reimbursing them the money to be expended by them, established a certain toll to be taken for all persons, animals and vehicles passing over the bridge, for the term of forty years.

They further say, that the right of establishing ferries and any other bridge over these navigable waters, as public necessity or convenience should require, was not by the act of 1784 granted away, but the same remains with the commonwealth as a sovereign state.

They further say, that before the enactment of the statute of 1791, c. 62, (passed March 9, 1792,) by which the proprietors of West Boston bridge were incorporated, Francis Dana and others applied by petitions to the general court for licenses to erect other bridges, representing that the wants and convenience of the public required that other bridges connected with Boston should be erected across these navigable waters; and thereupon the proprietors of Charles river bridge presented a remonstrance against the same, alleging that the granting of the petitions would militate against a grant to them from the commonwealth; whereupon the petitions and remonstrance were referred to a committee of both houses of the general court, who, after fully hearing those proprietors and the petitioners, re-

ported that there was no ground to maintain that the act of 1784 is an exclusive grant of the right to build over the waters of Charles river; which report was accepted by the general court.

They further say, that the proprietors of Charles river bridge made a false and colourable representation to the legislature as to their expenses and receipts, and that influenced by the misrepresentations, the legislature extended to seventy years the term of taking toll; and they insist, that by reason of the false representations this enlargement of the term ought to be deemed void.

They deny that any vote or by-law of the proprietors of Charles river bridge was ever passed, relinquishing the additional toll on the Lord's day; or that any vote or by-law was duly and seasonably passed accepting the provisions in the act of 1791, or that any exclusive right vested in that corporation by force of that act. They admit that the proprietors of West Boston bridge erected a bridge, but deny that the plaintiffs derived any right or title in consequence thereof. They deny that the plaintiffs have annually paid 666 dollars and 67 cents to Harvard College, or have complied with the terms of the act of 1784, and deny that they are entitled to the exclusive right and privilege claimed in their bill.

They allege, that the term of forty years mentioned in the act of 1784, had expired before the defendant's act of incorporation was passed; and further, that the proprietors of Charles river bridge had, previously thereto, been fully reimbursed all costs, interest and expenses by them incurred or sustained in building and maintaining their bridge, and had received besides, from the tolls, the further sum of 1,200,000 dollars, including interest.

They further say, that in 1785 the population of Boston amounted to 17,000 souls only, and that of Charlestown to 1200; and that before the enactment of the statute of 1827 *c.* 127, (passed March 12, 1828,) incorporating the defendants, the population of Boston had increased to upwards of 60,000 souls, and that of Charlestown to 8,000; that the population of the surrounding towns had increased in a like propor-

tion; and that Charles river bridge was not sufficiently large and commodious to accommodate the increased population, trade and commerce, but had long been, and then was, extremely inconvenient, as well as hazardous, for the transportation of persons, goods and merchandise; that in 1785, two thirds of the inhabitants of Boston dwelt at the northerly part of Boston and near to the place where the ferry was kept; but that in 1828 one half of Boston to the westward and southward of that place, which had been vacant land and water, had been built upon and contained more than 30,000 inhabitants, who could not carry on their trade and business but at great loss of time and money, and much inconvenience, without another and nearer avenue and bridge to Charlestown.

They allege that the public safety and convenience required that more commodious avenues to and from Boston should be constructed and maintained; and on the petition of John Skinner and other citizens representing the aforesaid circumstances, a committee of both houses of the legislature was appointed to examine into the facts, and hear all parties interested; that the committee gave due notice of their meetings and were attended by the plaintiffs and Skinner and others, and having deliberately and fully investigated the matters aforesaid, they made their report, that public convenience required, and that public justice did not militate against the grant of a charter for another bridge from Charlestown to Boston, which report was accepted; and thereupon the legislature, in order to the public welfare, and being the sole judges thereof under the constitution, did duly pass the act creating the corporation of the Proprietors of Warren Bridge; and they allege that the act was thereafter duly accepted by that corporation.

They further say, that on April 14, 1828, that corporation was duly organized; that before the filing of the bill, they had begun to build a bridge across Charles river, pursuant to their charter, but that it was not then, nor is it yet completed. They deny any avowed purpose or intent of diverting travel from Charles river bridge, and allege that their sole intent is to furnish another and more safe and convenient avenue for the accommodation of the public. They aver that if any damages

should be recovered at law by the plaintiffs, for any injury they may sustain, the corporation defendant possess property more than sufficient to satisfy the same.

They deny that the act of 1827 impairs the obligation of any contract with the proprietors of Charles river bridge; or that any right or property of the plaintiffs has been taken or appropriated to the public use through or by means of that act; and they allege that if any real estate had been taken, there is a mode provided in the 4th section of the act, by which compensation can be had therefor, pursuant to the provisions of the constitution of this commonwealth.

They deny that the travel referred to in the bill has always heretofore passed over Charles river bridge, and must, as the highways now are or ever have been established, necessarily pass over the same, if the Warren bridge should not be constructed; but they aver, that persons intending to pass to and from Boston and Charlestown, with their vehicles and animals, did before and since the act of 1784, pass and were transported in boats, and yet may so pass and be transported; and that since the act of 1784, such persons have passed, and may and still do pass, over Canal bridge and Prison Point dam bridge, at the distance of about 1700 feet from Charlestown square, and at the distance of about 90 rods from the main street leading thereto; which last bridges were erected by permission of the legislature, given by certain acts in 1806 and 1807, and the legislature authorized the same to be connected with a road leading thereto from the main street in Charlestown, by an act passed in 1814.

They deny that the construction intended for a bridge, yet is or can be a nuisance, as it regards the plaintiffs; or that if the rights of the plaintiffs were such as pretended, it could be any nuisance before toll had been diverted from Charles river bridge, and taken on behalf of the defendants. And they allege, that if any nuisance or wrong shall be created or done to the plaintiffs, by reason of the constructing and maintaining a bridge by virtue of the act of 1827 or otherwise, the common law will afford a plain, adequate and complete remedy, and they insist that this Court, as a court of chancery, has no jurisdiction in the premises.

And inasmuch as the several matters set forth in the bill, and stated by way of defence in the answer, are controversies concerning property, and in which parties have a right to a trial by jury, by the constitution of the commonwealth, the defendants require that the same may be tried by a jury to be for that purpose duly empannelled.

On the 13th of November 1828, (in term time,) the plaintiffs filed amendments to their bill.

In these they charge, that by the acceptance of the act of 1784 on their part, they became bound to the performance of the several conditions and stipulations contained in the act, on their part to be performed, for the benefit of the public.

They charge, that shortly after the passing of the act of 1784, the corporation were duly organized under the same, and have so continued to act to the time of filing this their bill; that before the expiration of the three years, the corporation finished the bridge and opened the same for public travel, viz. on the 17th of June 1786, and have ever since paid the annuity to Harvard College, and upheld and maintained the bridge; and they thereupon charge, that these acts and doings are conclusive evidence of their acceptance of the act of incorporation.

They charge, that after opening the bridge for public travel, Harvard College forthwith ceased to maintain any ferry from Charlestown to Boston, and have never since claimed to keep or maintain that ferry, or to demand or receive any tolls or other profits therefrom; that ever since the opening of the bridge for public travel, for the space of forty-two years, the plaintiffs, pursuant to the provisions of the act, have paid to Harvard College and the college have received the sum of 666 dollars 67 cents annually; whereupon they charge, that these acts are conclusive evidence that Harvard College were parties to the act of 1784, and agreed to all the provisions of the same, and to the surrender and assignment of their right in the ferry to the use of the plaintiffs, to enable them to build the bridge for the better accommodation of public travel between Charlestown and Boston, and that with such agreement the general court had good right so to transfer the exclusive right of Harvard College, by force of the act of 1784.

They charge, that no laws ever were or lawfully could be passed, under the power of regulating, to destroy or take away the franchise, or materially to impair or affect the right of Harvard College in and to the franchise of the ferry : but whether the general court had or had not the power of regulating the tolls of the ferry, or of otherwise controlling and managing the same, still the general court, by fixing the rate of tolls to be taken at the bridge, by the act of incorporation and by the additional act of 1791, for certain terms therein mentioned, fully executed their powers, for those terms, and by force of those acts the plaintiffs became entitled to collect and receive the tolls for those limited terms, free and exempt from any power of the legislature to reduce the same.

They charge, that by the act of 1784, no exclusive or other title to take the tolls could arise until the completion of the bridge ; that the erecting of it was declared to be a work of great public utility ; that the erection and maintenance of the same, at the great expense and hazard of the corporation, were contemplated as highly important and beneficial services rendered to the public; that the tolls were granted upon consideration of these services to be rendered to the public ; and so they charge, that such exclusive grant in no wise contravened either the letter or the spirit of the sixth article of the bill of rights.

They charge, that before the erection of their bridge, the ancient ferry between Boston and Charlestown was the only ferry between these towns, and that all regular public travel, direct between Charlestown and Boston and over Charles river, passed by the ferry ; that it manifestly appears from the act of 1784, that the bridge was intended for general public use and benefit, and the better to accommodate the public travel, which before had passed by the ferry, and as a substitute for the ferry ; that the provisions therein contained did not constitute a mere license to obstruct the navigable waters, but a contract between the corporation and the government, whereby the public granted the said exclusive rights to the corporation as a beneficial interest, in consideration of important public services by them to be performed, and whereby the government necessarily restrained themselves from granting any license to any other person in such

manner as to annul or essentially impair the beneficial franchise thus, for valuable consideration, granted to the plaintiffs.

In regard to the allegation, that a committee of both houses of the general court reported that there was no ground to maintain that the act of 1784 is an exclusive grant of the right to build over the waters of that river, the plaintiffs charge, that if such a report was accepted, it could not have the force of law, and even had it been made the basis of any legislative act, declaratory of the rights of the plaintiffs, it would have no force to invalidate or impair those rights; but they further charge, that the question whether the plaintiffs had or had not an exclusive grant of the right to build over Charles river, in its whole extent, has no bearing upon any question set forth or raised by the plaintiffs' bill.

They deny that a report of a committee of the legislature recommending that an extension of the term be allowed them for taking toll, was ever made or accepted, or that they ever solicited the acceptance of the same, or any enlargement thereof.

Protesting that the imputations of fraud on the part of the proprietors of Charles river bridge in obtaining an extension of their charter are wholly groundless, the plaintiffs nevertheless charge, that if any of those proprietors did make false representations, the act of 1791 would not thereby be void; and further, that the matter of this imputation, being matter of penalty and forfeiture, can be inquired into only by some proper proceedings in the name and by the authority of the commonwealth.

They charge, that immediately after the passing of the act of 1791, the proprietors of Charles river bridge caused all the clauses of the act, which in any way related to that corporation, to be entered in their book of records, in testimony of their acceptance of the same; that they thereupon forthwith ceased to take the additional toll on the Lord's day, according to the provisions of the act—which being for their benefit, their assent to the same is legally to be presumed; and further, that before the commencement of their extended term for taking tolls, they, as a corporation, for the purpose of obviating all objections in point of form, passed a full and formal vote, reciting the various previous acts of the corporation, which manifested a previous

acceptance of the additional act, and thereby expressly accepting the act; which several acts and votes they charge to be conclusive legal evidence of the acceptance thereof by the corporation.

The plaintiffs, denying that they have received the sum of 1,200,000 dollars, charge that the only reimbursement provided for and contemplated in the original and additional acts, was the uninterrupted enjoyment of the receipt of the tolls therein stipulated, for the terms therein mentioned; that the question how much they have received is rendered wholly immaterial by the express terms of the acts, but that in fact, whatever may have been the cost of the bridge to the early proprietors and stockholders, all the beneficial interest therein is divided into transferable shares and held by divers individuals, who, by distribution or purchase, or other good consideration, have acquired the same at valuations and estimates not founded upon the original cost of the bridge, but upon the probable amount of the tolls for the terms of time stipulated in the acts, and therefore that the corporation and the proprietors of the shares therein have not been and cannot be reimbursed in the manner contemplated and provided for in the acts, in any other way than by the free and uninterrupted enjoyment of the tolls for the terms of time stipulated.

The plaintiffs, not denying the increase of the population in Boston and Charlestown, and that to a certain extent, the legislature are judges of the public necessity and convenience, and for the purpose of facilitating the hearing and decision of this cause, withdrawing their express denial of the existence of such public necessity or convenience, nevertheless deny that the act of 1827 does any where express the determination of the legislature, that in point of fact any such public necessity or convenience did require the erection of another bridge over Charles river, between Boston and Charlestown, for the accommodation of the public travel, and further expressly charge, that if public convenience and necessity did require the erection of such other bridge, or other further accommodation of the public travel over the river, the same could not be granted in such manner as to destroy or impair the franchise of the plaintiffs to

collect and receive tolls, without a full and adequate compensation to them therefor; and further, that they have been at all times ready and willing to provide for such further public accommodation, as by their bill is fully set forth.

And the defendants pretend, that the construction so intended for a bridge is not yet nor can be a nuisance as it regards the plaintiffs, until toll shall have been diverted from Charles river bridge, and taken by the defendants; as if the opening of a free bridge, side by side, and nearly parallel to the bridge of the plaintiffs, on the same line of travel, and the permission for persons to pass thereon free of toll, were less an injury to the plaintiffs than the erection of a bridge and the taking of tolls thereon at the like rates with the tolls granted to and taken by the plaintiffs by virtue of their franchise.

The plaintiffs, denying that the sixth article in the bill of rights applies to the trial of matters in equity, and not admitting that there are any matters of fact at issue between the parties, requiring the intervention of a jury, nevertheless pray, if the Court should be otherwise of opinion, that, for that purpose, according to the usage and practice of chancery, such distinct and pertinent issue or issues as to matters of fact, may be framed by the Court, as the Court may judge necessary to be submitted to a jury.

On the 2nd of December 1828, (in term time,) the defendants filed an answer to the amended bill.

They say, that the proprietors of Charles river bridge did not, after the passage of the act of 1784, by any vote or written declaration, accept that charter or act; and they deny that the matters set forth by the plaintiffs, if they had been done and performed, can be deemed to be evidence of the acceptance of the act.

They say, that prior to the passing of that act, the revenue of the ferry had been for divers years, and then was, farmed out by Harvard College; and although it may be true, that their lessees did cease, at some time thereafter, to keep the ferry, yet the defendants deny that the college discontinued the ferry; or that the proprietors of Charles river bridge have paid to the college annually the sum set forth by the plaintiffs; or that any as-

sent was given by the college to the matters set forth by the plaintiffs; or that the legislature have fully executed their powers as pretended by the plaintiffs.

They say, that the gift to the college of the revenue of the ferry under the authority of the colonial government, was not the grant of any franchise; and if it were, that the rights of the ferry were not transferred by the act of 1784, nor the powers of the legislature in relation to the same in any way abridged.

They say, that prior to the forming of the constitution, the people of this commonwealth, long persuaded of the injurious tendency and grievous effects of monopolies, had, by public acts and laws, declared and manifested their will, that the depositaries of legislative and executive power should not grant any monopoly or exclusive privilege, unless for new inventions previously discovered and made, and then for a short time only; and in order to limit the powers of the legislature, they expressly provided, in the sixth article of the bill of rights, that no exclusive privilege should be granted, prospectively or conditionally, but solely after services had been rendered to the public, when their worth could be duly and fairly estimated; and if the act of 1784 had contained the grant of any exclusive privilege as claimed, the same would have been in direct opposition to the letter and spirit of that article, and therefore void.

They deny, that the erecting of Charles river bridge, or maintaining of the same, was by the act of 1784 contemplated as a highly important and beneficial service to be rendered to the public, but allege that the same was considered as an undertaking by the petitioners on their own account; and that the language of the preamble of the act, inasmuch as the same is a private act, is to be taken to be the representation of the petitioners, and not otherwise.

They deny, that it manifestly appears, from the whole of the act, that the bridge was intended for general public use and benefit, and the better to accommodate the public travel, and as a substitute for the ferry.

They deny, that the act constituted a contract between the proprietors and the government, whereby the public granted ex-

clusive rights as a valuable and beneficial interest, in consideration of important public services to be performed, or that the government necessarily restrained themselves from granting any license to any other person to build other bridges over these navigable waters.

They proceed to state more particularly the supposed misrepresentations as to the cost of building and maintaining Charles river bridge, and which they allege render void the act of 1791 so far as relates to extension of the time for taking toll; and they insist, that if the act is not absolutely void until so declared by some judicial process for that purpose to be instituted, yet that when the plaintiffs come into this court of equity, and seek to have the summary and extraordinary powers thereof exercised in support of a claim derived under the act, the defendants have a right to show that the claim is destitute of equity, and therefore ought not to be here enforced.

They allege, that the proprietors of Charles river bridge did, by their acts and votes, make themselves parties to the proceedings of the general court in 1792, and submitted their claims to the decision thereof, and were bound by the legislative declaration before mentioned.

They allege, that the proprietors of Charles river bridge acquiesced in and assented to the decision of the general court as to the construction of their act of incorporation, and ought not now to be permitted to controvert the same; and they insist that the petitions, remonstrance and reports, made to the general court, are rightly connected with and form a part of the private acts before mentioned, and bear directly on the questions raised in the bill and answer.

They deny, that immediately after passing the additional act, the provisions mentioned in the amended bill were entered in the books of the proprietors of Charles river bridge in testimony of their acceptance of the same, or that any entry thereof was made for more than ten years after that time; and they deny that any vote was passed upon the subject of acceptance, until four months next preceding the expiration of the forty years.

They say, that the proceedings before the legislature at the session when the act incorporating the defendants was passed, (the same being a private act,) and the report of the committee thereon, and the acceptance of the report, constituted a declaration by the legislature, in connexion with the act, that public necessity and convenience did require the erection of another bridge, in like manner as if the report had been repeated in the preamble of the act.

They say, that by the law extending the equity powers of this Court to cases touching waste and nuisance, it was not designed nor provided, that this Court should decide upon the quality or nature of any intended act of any person, until such act had been performed, nor was it intended to embrace cases of constructive nuisance; and they therefore allege, that whether a free bridge would or would not affect the claim of the plaintiffs as injuriously as a toll-bridge, has nothing to do with the matters presented by the bill and answer for the decision of this Court.

They deny that any bridge has been erected side by side and nearly parallel to the bridge of the plaintiffs, or that permission has been given by the defendants to any persons to pass free on any such bridge, as hypothetically stated by the plaintiffs.

They insist, that notwithstanding any usage or practice of courts of chancery elsewhere, the matters alleged and denied are controversies concerning property, and which, before the forming of the constitution of this commonwealth, had not been otherwise decided than by a trial by jury.

On the 14th of November 1828, (in term time,) the plaintiffs filed a supplemental bill, in which they state, that since the filing of their complaint, the bridge then begun to be built by the defendants has been so far completed, as that foot passengers are enabled to pass thereon from Boston to Charlestown and from Charlestown to Boston, and that great numbers have in fact so passed and have thereby avoided the payment of the tolls which would have been payable to the plaintiffs, had those persons passed over the plaintiffs' bridge; and they further state, that the Warren bridge has been nearly finished for the passage of all persons with horses, cattle and carriages of every descrip-

tion, and that the same, as they believe, will soon be opened for that purpose.

On the 2d of December 1828, (in term time,) the defendants filed a plea and answer to the supplemental bill, in which they admit that they have proceeded in erecting the Warren bridge, and that it has been so far completed, as that foot passengers are enabled to pass thereon to and from Boston and Charlestown; and they further say, that no persons have passed over by their permission or consent, except those employed by them in constructing, building and superintending the bridge; and they aver that they have prohibited people from passing the bridge, until it should be opened for travel.

They also say, that as to the matters set forth in the bill by way of supplement, and charged to have taken place since the institution of the original bill, they are distinct and independent of any matters charged in the original bill, and if they furnish any ground of complaint, they constitute different causes of action from those stated in the original bill, and cannot be taken into consideration in connexion with the original bill.

The plaintiffs filed a replication on the 19th of December 1828; which was in term time.

At a session of the Court held in June 1829, being a continuation of March term, the plaintiffs demanded that the cause should be heard as it stood in order on the docket. This was objected to, on the part of the defendants. Their counsel stated, that if filing and opening depositions in the clerk's office is to be considered as equivalent to a publication in the English chancery practice, the evidence on the part of the plaintiffs was published on the 26th of March; that since then, the defendants had not had sufficient time to take the evidence on their side; and they urged, that if the plaintiffs wished to speed the cause, they ought to have obtained a rule upon the defendants for the publication of their depositions; that by the English practice, after an order of publication, an entire vacation is given, before the cause is set down for a hearing, and there must be a subpœna to hear judgment, returnable before the cause is to be heard; that although the English practice is not adopted here in all its minutiæ, yet in the 1st of the "Rules for the regulation of the prac-

tice in chancery" this "Court adopt, as the outline of their practice, the practice of the English courts of equity, so far as the same is not repugnant to the constitution and laws of the commonwealth, nor to the rules which the Court shall from time to time make;" Metcalf's Dig. 88; and if the plaintiffs expected that the cause should now be heard, they ought to have given the defendants notice; and that the case did not come within the 7th of the rules above mentioned, inasmuch as there was no order to file a plea, demurrer or answer in the vacation, and the defendants were not served with an attested copy of the bill, and no replication was filed in the same vacation. 1 Newland's Ch. Pract. 294, 302; Beames's Orders in Ch. 319, 333, 336; 1 Harrison's Ch. Pract. 497, 500, 523; 1 Grant's Ch. Pract. 191.

The counsel for the plaintiffs said that the cause was brought to an issue in December, and the parties proceeded to take their evidence, in order to be ready for a hearing at the then ensuing March term; and they relied on the 7th rule above cited, which provides, that when a bill is filed in term time and an answer in the vacation, "the plaintiff may file his replication in the clerk's office in the same vacation; and upon giving notice of such replication to the defendant, not less than thirty days before the ensuing term, the parties may proceed to take the examination of their witnesses, so that the cause may be heard and determined at the ensuing term. Or if the plaintiff shall elect to proceed to a hearing of the cause on the bill and answer, he may give notice thereof to the defendant, not less than thirty days before the ensuing term, and the cause shall be then heard and determined accordingly."

Per Curiam. If we were bound by the rules of the Court of Chancery in England, the plaintiffs would not be entitled to a hearing at this time. There, when a cause is set down for hearing, a subpœna to hear judgment is to be served upon the adverse party ten days before the day of hearing, if he lives within twenty miles of London, and fourteen days, if beyond that distance.

But these rules are not in force here. We have not adopted them formally, and there has been no usage from which their

adoption might be inferred. It has been an object with us to simplify chancery practice; which can be effected only by avoiding too much regulation. We require only that proper notice shall be given, according to the exigency of the case; so as to hasten the proceedings as much as possible, without prejudice to a party for want of time. The construction given by the counsel for the defendants, to the 1st of our rules, is superseded by the 7th rule. Notice, as therein mentioned, being given thirty days before the ensuing term, a case in chancery stands for hearing like any other case, and is subject to motions like other cases. The case before us comes within the equity of this rule.

The *Court* further remarked, that it was not necessary to have a particular rule for the publication of testimony. The filing and opening of depositions in the clerk's office is equivalent to a publication. They will be on the files and open to the inspection of the parties.

The defendants afterward claimed "the right secured to them by the constitution of this commonwealth, of a trial by jury of the whole matters in controversy, it never having been, before the adoption of the constitution, otherwise used or practised in this commonwealth in such cases; and they deny that the legislature have the power to take from them the right to such general trial, or to authorize the Court to select particular facts and direct issues thereon." They designated several points as indispensably requiring the intervention of a jury.

Fletcher and *Aylwin* rested this claim, as a matter of right, on the 15th article of the declaration of rights; which provides, "that in all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practised, the parties have a right to a trial by a jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it."

But as a matter of discretion, the Court would refer these questions to a jury. Even in England, where undoubtedly the chancellor may determine the facts, the power is exercised

" very tenderly and sparingly." *St. Paul's* v. *Morris*, 9 Ves. 168; 2 Madd. Ch. Pr. 364.

Webster and *Shaw*, *contrà*. In cases in which, before the adoption of the constitution, chancery jurisdiction was given to this Court, the whole power of an English court of chancery was exercised. There was no trial by jury, as a matter of right; so that cases in chancery are within the exception in the declaration of rights. Thus, in chancering the penalty of a bond, after forfeiture confessed or found, the Court determined the facts; as the fact of payment, &c.; though they might, in their discretion, direct such facts to be determined by a jury.

If the defendants could, as a matter of right, deny the bill generally, and have a trial by jury, this claim should have been made sooner. By answering, they have waived the right. In chancery the court get the facts from the party himself, and if he is compelled to be a witness himself, the trial by jury, in the common understanding of the terms, is taken away.

This is a motion, before a hearing, for issues to try matters of fact. It is a question of practice merely, and does not involve a consideration of the construction to be given to the declaration of rights. There is nothing in the English practice, of having a hearing before issues are directed, that is inconsistent either with the constitution or with our own practice. The usual course, in an equity suit, is to hear the pleadings and evidence, and observations upon them, and then, if the court see fit, to direct an issue. This is always done by an interlocutory decree upon the hearing, and is a matter of discretion. The decree states what facts shall be admitted and what evidence shall be received, with other particulars relating to the trial. 2 Madd. Ch. Pr. 363; 1 Newl. Ch. Pr. 350; 1 Grant's Ch. Pr. 210; 2 Anstruth. Rep. 480; 2 Fowler's Exch. Pr. 194; *Dale* v. *Roosevelt*, 6 Johns. Ch. R. 255; *Le Guen* v. *Gouverneur*, 1 Johns. Cas. 436. There are but two courses to be pursued; the Court must either hear the case, and ascertain that there is a substantial controversy in respect to an important fact which should be determined by a jury, or they must refer the whole case to the jury, making them chancellors under the guidance of the Court.

Fletcher, in reply, said that every thing that is desirable in a court of chancery, may be obtained, without violating the constitution. 3 Bl. Com. 381. Although before the constitution was adopted, certain cases in chancery may have been heard without a jury, it does not follow that the legislature may withdraw from a jury all cases which are subsequently made matters of chancery jurisdiction.

Webster. *Cases*, in the 15th article, means *classes of cases*, and cases in chancery composed one of those classes.

Fletcher. It is said we have waived our right to a trial by jury, by filing an answer. We claim it in the answer itself. Had we previously insisted on such trial, there would have been no issue for the jury. We have a justification; must we not plead it? If not, what have we to try? The rules in England are not applicable here in their full extent, but the Court regard the spirit of them as affected by our laws. There, the chancellor, having power to determine the facts, directs an issue of his own motion and to satisfy his conscience, and he must hear the cause first; here, the party claims a trial by jury as secured to him by the constitution. The Court can examine the pleadings and the suggestions of the parties, to see if there are any, and if any, what questions to be tried by a jury. [*Parker* C. J. Suppose issues shall be framed on all the questions in your motion; both parties have taken testimony in writing; when you go before a jury, is all this evidence to be received, some of which is different from the evidence commonly used in jury trials?] That is a question to be determined at the trial. It is not inconsistent with a trial by jury, to put a party on his oath. Our statutes provide for it already in some cases.

Webster insisted, that the proper time for the defendants to demand a trial by jury, was upon the rule to file an answer. They ought then to have objected to putting in an answer. Answering with a *protestando* is the same thing as answering without one, and is a waiver of a trial by jury as a matter of right.

Parker C. J. delivered the opinion of the Court. We are brought to the consideration of a question of high importance to the partial and limited system of equity established by the legislature, with very little time and opportunity to give it the atten-

tion it deserves. It is one of the most obvious disadvantages of the present mode of administering the power, that those who are charged with it are, by incessant engagements in the ordinary course of their functions, rendered in a measure disqualified for the exercise of duties, which, to be well discharged, require the undivided application of a single mind. We however must submit to the ordinances of higher powers, and be content with discharging our duty honestly, until the legislature, in their wisdom, shall see fit to make a better disposition of this branch of judicial power.

The question proposed, in its broadest terms, strikes at the root of a system of equity in this commonwealth, as hitherto administered; for if, upon a bill in chancery, the respondent has a right to claim that the whole case shall be tried by jury, it is obvious that these cases are brought back again to common law jurisdiction, with some increase of power in the Court, and some change in the form of trial, but with little of the character of chancery proceedings as practised in England, in the Courts of the United States, or of any of the states which have established such a system. Whether this would be an improvement or not, we are not prepared to say; but it would be clearly contrary to the declared intention of several successive legislatures since the year 1818, when the first statute was enacted giving to the Court jurisdiction in matters of equity; for in that, and in all the statutes since passed, though the subjects referred to the Court are specific, the authority over them is as unlimited as the Lord Chancellor in England possesses, for we are referred to the rules and proceedings in chancery, as the guide and only limitation of our authority.

The motion now made is for a trial by jury, and it is insisted on as a right secured by the declaration of rights, prefixed to the constitution and making a part thereof.

The article relied on is in no ambiguous language; nothing could more explicitly declare the intention of the people, that with the exceptions therein contained, the right to trial by jury should never be invaded. Now the case presented by this bill is a controversy concerning property, and it is also a suit between parties; so that unless it is a case in which, at the time

of the adoption of the constitution, a different mode of trial could be said to have been practised, it is most clearly included in the article. But we wish not to decide this question now, believing it not to be necessary, and that further time might enable us to show that the case comes within the practice. We find that the colonial legislature, in the year 1685, vested in the county courts as ample jurisdiction in matters of equity, as exists in the courts of chancery in England. That statute continued in force until the grant of the provincial charter in 1691, by which the colonial statute was probably considered to be repealed. After the charter, in 1692 the whole chancery power was vested in the governor and eight of the council, with a power to delegate it to a chancellor to be appointed by the governor. The next year the legislature, declaring that this mode of administering the power was found in practice to be inconvenient, repealed the law, and transferred the power to three commissioners; and in the succeeding year this tribunal was superseded, and a high court of chancery was established. We have it from tradition, and I have seen it somewhere in history, that these several acts became null and void by reason of the negative of the king, which was exercised according to the charter, within three years after their enactment; they were however in force, according to the provisions of the charter, until the veto of the king was made known to the constituted authorities here. Now whether the framers of the constitution, and the people, had reference to those former chancery tribunals, when they adopted the exception to the general provision in the 15th article, may admit of question; we are inclined to think, however, that the word "heretofore," in the exception, could hardly be applicable to a practice which had ceased to exist nearly a century before the constitution was adopted. In regard to probate cases, and suits for redemption of mortgages, the practice of trying facts by the court instead of the jury, had continued down to the adoption of the constitution. But we say again, that we do not wish to decide this question now, any further than to declare, that a reasonable construction of the 15th article does not require that a suit in chancery shall be tried just as a suit at common law would be, and that there is no ne-

cessity that the whole case shall be put to the jury. The most that can be made of the article is, that all controverted facts deemed essential to the fair and full trial of the case, shall be passed upon by the jury, if the parties or either of them require it. And whether the facts proposed to be so tried are essential or not, must of necessity be determined by the court. There may be many facts stated in a bill and denied in an answer, and also facts alleged in the answer, which are wholly immaterial to the merits of the case, and such facts the court may refuse to put to the jury; just as in an action at common law, if a party offers to prove facts which are irrelevant, the court may reject the proof; and as immaterial issues, even after verdict, may be rejected as nugatory. The right of the party to go to the jury is preserved, if he is allowed that course in regard to all such facts as have a bearing upon the issue for trial.

But it is objected, that according to the course of proceedings in chancery, the motion is premature, because an issue can be directed only on a hearing, for it cannot be determined of what facts the issues shall consist, until after a hearing shall have taken place, and the evidence is looked at which is adduced in support of the facts.

If it were true, that issues to the country should be ordered only when the court, on inspecting the evidence, found a difficulty in deciding the fact, this position would be maintained; but certainly a full hearing is not necessary in order to come to the result; for if by inspecting the bill and answer it should be perceived that there are important facts asserted and denied, we do not see why issues may not be directed as soon as the court shall determine, in their discretion, that those facts shall be so ascertained: and certainly much time may be saved by this course of proceeding. Now in exercising discretion upon an application for an issue, the Court cannot but have some regard to the expression of the public will in the declaration of rights on this subject of a trial by jury, so as more carefully to preserve the general principle, although they may doubt of the existence of a right. This Court cannot be desirous of enlarging its jurisdiction, or of assuming the trial of facts in any case, and certainly not in the exercise of a jurisdiction reluctantly

given by the legislature and by no means coveted by us. In most cases therefore, when a trial by jury shall be asked for, it will probably be granted, unless it shall manifestly appear that the object of pursuing that course, in the party applying, is to delay or embarrass the cause by putting to the jury issues wholly immaterial. If however it is still insisted, that a hearing to some extent should be first had, in order to understand the pertinency of the facts sought to be tried, we will hear counsel further upon that point.

We have looked over the numerous points selected by the counsel as proper subjects of an issue, and compared them with the bill and answer, and are satisfied that some of them are of a character suitable for the jury, if the party requires it, though in regard to most of them the evidence will probably be of a nature to be judged of, in regard to its legal effect, by the court, rather than the jury ; such as statutes, records, &c. ; and in regard to these, it will be a matter of discretion in the counsel, whether, after all, a trial by jury will be of any use. There are other points suggested, which we deem wholly immaterial to the rights of the parties and the decision of the cause, and these will not require an issue.

If a trial by jury shall be still claimed, we think it our duty to provide for such a trial as soon as possible. We can see no good reason for delay. The parties are at liberty, if they agree, to use the depositions which have been taken in the cause ; if they do not, they know the facts to be proved and the witness by whom it is expedient to prove them.

The *Court* proceeded to state which of the questions proposed by the defendants were proper to be tried by a jury, and which were not ; giving liberty however to counsel to object to the discrimination.

The *St.* 1791, *c.* 62, § 9, provides, " that in consideration of the privileges in this act granted to the proprietors of Charles river bridge, the said proprietors shall relinquish the additional toll on the Lord's day, from and after the passing of this act ; " and one of the questions proposed to be submitted to a jury was, whether this provision had been complied with. The *Court* said, that this was not proper to be tried ; because the

provision was only a condition subsequent, the non-performance of which might be a ground of forfeiture upon proper process instituted by the government, but could not be taken advantage of by a stranger.

Another question was, whether the proprietors of Charles river bridge procured the extension of their charter by the act of 1791, by means of false suggestions and false and colourable representations to the legislature. This question, the *Court* said, was immaterial. If fraud was practised, the charter could be revoked only upon a process of *quo warranto*. As the corporation had been suffered to exist forty years, and had been found beneficial, the government might be willing to let it continue, even if an extension of the charter had been fraudulently obtained. The defendants cannot take advantage of the supposed false representations. A man passing over the bridge might as well refuse, on the same ground, to pay the toll. If the question had come up in an action on the case against the plaintiffs for a nuisance, it would have been considered irrelevant. Further, in the act incorporating the proprietors of the Warren bridge the charter of the plaintiffs is recognised, and some indemnity is provided for them. So that the question of fraud must be thrown entirely out of the case.

After this opinion was given, the defendants waived their right to a trial by jury, and in October 1829 the cause was heard upon the merits.

By the evidence it appeared, that at a court of assistants held at Boston November 9, 1630, it was ordered, "that whosoever shall first give in his name to Mr. Governour, that he will undertake to set up a ferry betwixt Boston and Charlton, and shall begin the same at such time as Mr. Governour shall appoint, shall have 1 *d.* for every person, and 1 *d.* for every hundred weight of goods, he shall so transport."

1631. "Edward Converse hath undertaken to set up a ferry betwixt Boston and Charlestown, for which he is to have two pence for every single person, and one penny a piece if there be two or more."

November 5, 1633. "Mr. Richard Brown is allowed by the court to keep a ferry over Charles river against his house, and is

to have two pence for every single person, he so transports, and one penny a piece if there be two or more."

At the general court held at Newtown, May 6, 1635, "it is ordered, that there shall be a ferry set up on Boston side, by Wind-mill hill, to transport men to Charlton and Winnesimet, upon the same rates that the ferrymen at Charlton and Wenesemet transport men to Boston."

November 2, 1637, the ferry between Boston and Charlestown is referred to the governour and treasurer, to let at 40*l.* *per annum*, beginning the first of December, and from thence for three years.

Evidence was given of an instrument in the hand-writing of governour Winthrop, with an apparently original signature of "Edward Converse," dated November 28, 1637, stating that "the governour and treasurer, by order of the general court, did demise to Edward Converse the ferry between Boston and Charlestown, to have the sole transporting of passengers and cattle from one side to the other, for three years from the first day of the next month, for the yearly rent of forty pounds, &c. provided that he see it be well attended and furnished with sufficient boats, and that so soon as may be in the next spring, he set up a convenient house on Boston side, and keep a boat there as need shall require; and he is allowed to take his wonted fees, viz." &c.

At a general court held September 6, 1638, "there is a ferry appointed from Boston to Winnetsemet, Noddle's Island and the ships—the person to be appointed by the magistrates of Boston."

In an ordinance respecting Harvard College, to which in the edition of the laws published in 1672 are affixed the dates of 1636, 1640 and 1642, it is recited that "there is a college, &c. for the encouragement whereof this court hath given the sum of four hundred pounds, and also the revenue of the ferry betwixt Charlestown and Boston."

At a general court held October 7, 1640, "the ferry between Boston and Charlestown is granted to the college."

At a session in October 1644, "it is ordered, that the magistrates and deputies of the court, their passages over the ferries

together with their necessary attendants shall be free, not paying any thing for it, except at such ferries as are appropriated to any, or are rented out and are out of the country's hands, and there it is ordered that their passages shall be paid by the country."

At a general court in 1646, in answer to the petition of James Heyden, with his partners, ferrymen of Charlestown, it is declared, that by "necessary attendants" in the last order, is meant a man and a horse, and not the families of the magistrates or deputies.

Harvard College was made a corporation in May 1650.

At a general court held October 15, 1650, "in answer to the petition of Henry Dunster, president of Harvard College, respecting the hundred pounds due from the country to the college, and rectifying the ferry-rent, which belongs to the college," it is ordered, that "when the lease is expired, it shall be in the liberty and power of the president, in behalf and for the behoof of the college, to dispose of the said ferry by lease, or otherwise making the best and most advantage thereof to his own content, so as such he disposeth it unto perform the service and keep sufficient boats for the use thereof as the order of court requires."

In October 1654, the general court, reciting, that "at present the work of the college hath been several ways obstructed, and seems yet also at present for want of comfortable maintenance for the encouragement of a president," and "fearing lest we should show ourselves ungrateful to God, or unfaithful to posterity, if so good a seminary of knowledge and virtue should fall to the ground through any neglect of ours,"—order, "that (besides the profit of the ferry formerly granted to the college, which shall be continued) there shall be yearly levied by addition to the country rate, one hundred pounds, to be paid by the treasurer of the country to the college treasurer, &c. and this to continue during the pleasure of the country."

At a general court in May 1655, "in answer to the petition of Mr. Charles Chancey, president of Harvard College, &c. the treasurer is desired to disburse the sum of 30*l.* to furnish his necessary occasions, to be repaid out of the first rent of the ferry."

By *Prov. St.* 6 *W. & M. c.* 6, (Anc. Charters &c. 280,) "for regulating ferries," it is provided, "that boats be kept on either side of the water, at Charlestown ferry, &c. the ferrymen on each side to have a separate interest; and that the ferry be not from henceforth leased out otherwise. And all the members of the general assembly shall be ferriage free at all ferries, in their passing to and from the assembly, and shall be transported without any unnecessary delay, on pain of forfeiting twenty shillings."

By *Prov. St.* 8 *Will.* 3, *c.* 6, (Anc. Charters &c. 294,) it is provided, "that when and so often as it shall happen, that the boats employed for the ferry betwixt Boston and Charlestown shall be on the same shore, upon the landing of the second boat, the first shall forthwith put off and pass over to the other side, passengers or no passengers," on penalty, &c.

The *Prov. St.* 9 *Ann. c.* 1, "for the better regulating the ferry over Charles river, betwixt Boston and Charlestown," after reciting that several petitions had been offered to the general court, signed by many of the inhabitants of Charlestown, Cambridge and other towns, complaining of neglect of due attendance of the ferry, "and having thereupon been attended by the treasurer of the college (the profits and revenues of the said ferry being granted to Harvard College in Cambridge) and seen the lease by him made of the said ferry for several years yet to come,—for redress of the grievances complained of, and to the intent the said ferry may be accommodated for the good and service of the province, and of her Majesty's subjects within the same, much increased over what they were at the first settling of the ferry, now become a great passage for transportation; which, that it may be done with the more ease and speed, the said lease or leases notwithstanding:"—enacts, that there shall be "three sufficient suitable boats," and prescribes the mode and time in which they shall continue plying and the rates of ferriage; "the said three boats to be three several separate interests, not all of one town."

The first book of the college records is said to have been destroyed when the library was burnt, in 1764. The first entry on the subsisting records relative to the ferry, is of a meet-

ing of the corporation on August 4, 1701, when it was voted, "that the ferry at Charlestown be let to John Russell," &c.

At a meeting, April 7, 1713, after a recital that "a motion has been made in the general court for the building a bridge over Charlestown ferry, and a committee appointed thereupon to receive proposals, &c. it is voted—"That the president, the treasurer, &c. be desired to represent and insist upon the right which the college hath in and to the profits of the said ferry, before the said committee, and as they shall find it needful and proper, before the general assembly."

At a meeting, October 27, 1713, it was voted, that whereas the general assembly have directed Dr. Clark and a committee of the house of representatives, upon a proposal to erect a bridge over the ferry, to confer with the college upon that affair, the president &c. be a committee to confer with Dr. Clark, &c.

At a meeting, February 10, 1725, the corporation vote that each of the boats be, for three years following the first of May next, leased to one person only, instead of two, as it then was.

At a meeting, April 1, 1728, it is voted, that the treasurer be desired to inquire what will be the expenses of repairing with smooth stones the ferry-way on the Boston side.

At meetings, on November 17, 1777, May 5, 1778, and November 28, 1779, votes were passed, directing the treasurer to settle the accounts for repairs on the ferry-ways, fixing the rent of the ferry and the rates of ferriage.

At a meeting, October 11, 1780, it was voted, "that the treasurer be directed to order the necessary repairs for sheds on each side of the ferry, the cost to be hereafter laid before the general court for allowance,"

On the 16th of May 1781, an act (*St.* 1780, *c.* 42,) was passed, "for the better government and regulation of the ferry between Boston and Charlestown, and for repealing the laws heretofore made for that purpose." This statute requires, among other things, that there shall be four boats; that each boat shall have a separate interest; that no person shall be appointed by the corporation of Harvard College a master ferryman, unless he shall be previously approved as a suitable person by the selectmen of Charlestown; that upon notice from

those selectmen of the misconduct of any of the ferrymen or owners of the boats, the corporation shall within sixty days discharge such ferryman or owner from any employment in the ferry, and in case of their neglect or refusal so to do, shall forfeit a sum equal to the rent of the ferry for the then current year; that whenever the corporation shall make any alteration in the rates of ferriage, they shall publish the rates by them established, in one or more of the Boston newspapers; and that there shall be made and kept in good repair, a convenient and comfortable shed, and suitable ways for passing to and from the ferry-boats, at the landing-place on each side of the river, at the charge of the corporation.

On February 17, 1786, upon an application of the ferrymen for an abatement of rent, the college voted, "that they be excused from paying any rent for the last three months preceding the opening of the bridge, provided they pay the rent now due, or that may be due to the aforesaid time, and conform themselves in all things agreeably to the rules and orders, settled by the corporation for the regulation of the ferry."

No vote was found, relating to the ferry, of a later date than the one last mentioned. The college records contain many other votes respecting the regulation of the ferry, the amount of fare, the leases and rents, similar in character to those above recited.

The secretary of the corporation testified, that in the records for one year before the 9th of March 1785, and for the period since elapsed, there is no vote of the corporation conveying, or authorizing any person to convey, on behalf of the college, any ferry rights, or the ferry between Boston and Charlestown, to any person or corporation whatever.

It appears from entries in the books of account of the college, that the college received annually, for many years after 1639 and to the month of May 1786, various sums of money as the profit or income of the ferry. In some years between 1639 and 1786, no account of the receipts of the ferry can be found. For several years after the grant of the ferry, the college managed it by their agents. For about one hundred years before 1786 they leased it at an annual rent payable quarterly. The rents fluctuated very much during that period.

Extracts from the records of the colony of Massachusetts were exhibited, respecting other ferries. In 1638, "Garret Spenser is granted the ferry at Lynn for two years, taking two pence," &c. In 1639, "the ferry between Mount Woolaston and Weymouth is ordered to be removed to the nearest and most convenient place," &c. In 1641, "it is ordered, that they that put the boats between Cape Ann and Anisquam, shall have liberty to take sufficient toll, as the court shall think meet, for one and twenty years." In 1648, upon information given that there is no ferry kept over Neponset river, between Dorchester and Braintree, John Glover is empowered "either to grant it to any person or persons, for the term of seven years, so it be not any way chargeable to the country, or else to take it himself and his heirs, as his own inheritance forever; provided that it be kept in such a place and at such a price, as may be most convenient for the country, and pleasant to the general court."

In 1670, "for the encouragement either of the town of Cambridge or any particular persons that shall repair the bridge, or erect a sufficient cart-bridge over the river at Cambridge, and maintain the same for the safety of passengers, they are hereby empowered to take toll at the rates following, &c. and this order to continue in force so long a time as the said bridge is maintained serviceable and safe for passage."

On February 2, 1785, Thomas Russell and others offered a petition to the legislature, representing, "that the only communication between Boston and the easterly and northerly part of this state, is by ferries, &c. and it has long been the wish of many to see a bridge erected across Charles river, in the place where the ferry between Boston and Charlestown is now kept;" that the "petitioners, taking into consideration the great advantage that will arise, not only to the towns of Boston and Charlestown, but to all the country to the westward, northward and eastward, by the accomplishment of so desirable an object, have made some inquiries, &c. and have good reason to suppose that such a work (though at great expense) may be accomplished in such way and manner, as greatly to accommodate the public in general;" that they "are willing, provided suitable encouragement is given them, to undertake said work at

their own cost and charge;" and they pray to be incorporated "for the purpose aforesaid, under such liberties and regulations, as will make to them a suitable compensation for the great risk and charge that will be incurred in the prosecution of said business."

On February 3, 1785, John Cabot and Andrew Cabot presented a petition to the legislature, representing that a bridge over Charles river, from Lechmere Point in Cambridge to Barton's-Point in Boston, would be essentially useful to the public; that the petitioners are ready to build one at their own expense; that they will be content to receive such reasonable toll as the legislature shall think fit to establish; that so soon as the sum which may be expended in building the bridge, and the interest thereof, shall be paid to the petitioners by the reception of the toll, they will renounce all title to the bridge and the profits thereof, and the same shall be vested in the commonwealth; and that so long as the petitioners shall be entitled to receive the toll, they will engage to pay 200*l.* annually for the use of Harvard College.

On February 12, 1785, a petition was presented on behalf of the inhabitants of Charlestown, stating their sufferings during the war of the revolution, setting forth the advantages of having a bridge where the ferry is kept, and the inconveniences to the public and the injuries to themselves, which would attend a bridge erected from Lechmere Point to Barton's Point, appealing to the compassion and justice of the legislature, and praying that the petition of Russell and others may be granted and that of the Cabots denied.

These three petitions were referred to a committee of both houses of the legislature, who reported that the petitioners for building a bridge at the ferry should have leave to bring in a bill for that purpose, upon certain principles; one of which was, that there should be established, as a compensation for the expense of building and repairing the bridge, and as a revenue for the use of Harvard College, certain rates of toll, which were specified, for the the term of ——— years.

On March 9, 1785, an act was passed (*St.* 1784 *c.* 53,) "for incorporating certain persons for the purpose of building a

bridge over Charles river, between Boston and Charlestown, and supporting the same during the term of forty years." After reciting in the preamble, that "the erecting of a bridge over Charles river, in the place where the ferry between Boston and Charlestown is now kept, will be of great public utility," and that Thomas Russell and others have petitioned for an act of incorporation to empower them to build the bridge, the act provides (§ 1), that Russell and others shall be a corporation under the name of The Proprietors of Charles River Bridge: (§ 3), that "for the purpose of reimbursing the said proprietors the money expended, or to be expended, in building and supporting the said bridge, a toll be and is hereby granted and established for the sole benefit of the said proprietors, according to the rates following, &c. and in all cases double toll shall be paid on the Lord's day, &c. and the said toll shall commence at the day of the first opening of the said bridge for passengers, and shall continue for and during the term of forty years from the said day:" (§ 4), that the bridge shall be well built, at least forty feet wide, with a convenient draw; shall be kept in good repair for the term aforesaid, and at the end of the term shall be left in like repair; shall be constantly kept accommodated with at least twenty good lamps on each side &c.; and the draw shall be lifted for all ships or vessels without toll or pay, except such as usually pass under Cambridge bridge, and those passing for pleasure: and (§ 5), "that after the said toll shall commence, the said proprietors or corporation shall annually pay to Harvard College or University the sum of two hundred pounds, during the said term of forty years, and at the end of the said term, the said bridge shall revert to and be the property of the commonwealth, saving to the said college or university a reasonable and annual compensation for the annual income of the ferry, which they might have received had not said bridge been erected."

In 1792, the corporation of Charles river bridge remonstrated against the petitions of Francis Dana and others, praying for license to erect a bridge over Charles river from West Boston to Cambridge. They allege, that in consequence of the charter granted to them in 1785, the proprietors of Charles river bridge immediately exerted themselves in its erection, at an expense which

has amounted to upwards of 51,000 dollars, and have since added to that expense for its support, 18,800 dollars more; that in 1649 [1640] this government (in the idea of this corporation) made an absolute exclusive grant of the ferry between Boston and Charlestown, to Harvard College, and upon this idea the corporation purchased this grant of the college at the price of 200*l.* per annum; that a full and valuable consideration was made for the grant aforesaid, by the corporation contracting with the legislature, that the bridge, at the expiration of forty years, should revert to the public in good repair; that the profits have never amounted to eleven per cent. upon the original cost, and that if a new bridge so near the present one should be erected, more than one half of the present profits must be lost: And they pray that the petitions may be dismissed, as militating in their principles with public faith, and operating to the very great injury of the remonstrants.

On Saturday, February 18, 1792, in the senate, it was ordered, that the next Monday be assigned for hearing the proprietors of Charles river bridge, by their counsel, relative to the report of the committee of both houses, granting the petition of Dana and others, and that those proprietors notify the petitioners, as soon as may be, of this assignment.

At the same session of the legislature, the college offered a memorial, stating "that in the year 1640 the legislature, in order to encourage learning, granted to the college the perpetual right of conveying passengers with their effects across Charles river, from and to Boston;" that when the British troops evacuated the town of Boston, the college, at a considerable expense, repaired and widened the ways and built sheds, &c. and that they received an annual income of 200*l.*, which income, as the country increased, would undoubtedly have increased in the same proportion; that a few years after, some persons made application to the legislature for liberty to build a bridge across the river, which was granted, on condition of their paying to the college the sum of 200*l.* annually; that to this the college, sensible of the advantage to the community in general from such an undertaking, made no objection, supposing that at the expiration of the term for which the bridge was given, it would be-

come the property of the college; that the corporation, hearing of an application for liberty to build another bridge over the same river, think it their duty to present this memorial, in full confidence that the legislature will take such measures as shall seem best, to compensate the college for the loss of the increasing income which would have arisen from the privilege granted them to the river.

A committee of both houses made a report, which was amended and accepted, that it would be expedient to grant to Dana and others leave to build a bridge over the waters of Charles river from West Boston to Cambridge on certain conditions. They further report, that they have considered the memorial of the college, and that they think it will be expedient to grant to that corporation the sum of 450*l.* [as amended, 300*l.*] annually, during the term of twenty [as amended, forty] years, and for such further time as the legislature may hereafter direct. They further report, "that after attending to the memorial of the proprietors of Charles river bridge, and hearing them fully on the subject, they are of the opinion that there is no ground to maintain, that the act incorporating the proprietors for the purpose of building a bridge from Charlestown to Boston, is an exclusive grant of the right to build over the waters of that river; but considering the erection of Charles river bridge was a work of magnitude and hazard, and that great benefits have arisen to the public from the success of that enterprise, and considering also that the erection of the proposed bridge may diminish the emoluments of the proprietors of Charles river bridge, which may operate as a discouragement to great and beneficial undertakings in future, the committee think it reasonable and proper that a further time of twelve [as amended, thirty] years be granted to said proprietors to receive and collect for their benefit the toll now established by law for passing said bridge."

On March 9, 1792, an act was passed, (*St.* 1791, *c.* 62,) incorporating Dana and others, for the purpose of building a bridge from the westerly part of Boston to Cambridge. This act, for the purpose of reimbursing the corporation their expenses in building and maintaining the bridge, and of indemni-

fying them for their risk, grants them a certain toll for the term of forty years, (§ 4). It provides (§ 5.), that at the expiration of that term, the bridge shall be surrendered in good repair to the commonwealth ; and (§ 6), that after the toll shall commence, the corporation shall pay annually to Harvard College the sum of 300*l.* during the term of forty years. In § 7, 8, it is said, " And whereas the erection of Charles river bridge was a work of hazard and public utility, and another bridge in the place proposed for the West Boston bridge, may diminish the emoluments of Charles river bridge, therefore, for the encouragement of enterprise," be it enacted, &c. that the proprietors of Charles river bridge shall continue to be a " corporation and body politic, for and during the term of seventy years, to be computed from the day that said Charles river bridge was completed and opened for passengers," subject to the conditions and regulations prescribed in their act of incorporation, and during the aforesaid term of seventy years they " may continue to collect and receive all the toll granted by the aforesaid act for their use and benefit ; provided, however, they also continue to pay annually to said Harvard College the sum of 200*l.* &c. ; and at the expiration of said term of seventy years, said Charles river bridge shall revert to and be the property of the commonwealth, and shall be surrendered in good repair." In § 9, " it is further enacted, that in consideration of the privileges in this act granted to the proprietors of Charles river bridge, the said proprietors shall relinquish the additional toll on the Lord's day, from and after the passing of this act."

In 1800, upon an application to the legislature by the proprietors of West Boston bridge for an extension of their interest in the bridge, the college presented another memorial, in which they set forth the grant to them of the ferry between Boston and Charlestown, claiming it as a grant in perpetuity, and praying that the reasonable claims and just interests of the college may not be overlooked. It is stated in this memorial, that in 1712, when, upon the petition of John Clark, a bridge over Charles river was contemplated, it was done with " an express reservation of the interest and revenue of the ferry to the college," and that the general assembly, of their own mere

motion and sense of justice, directed the petitioner and a committee of the house of representatives to confer with the president and fellows of the college on that affair.

In 1805 the proprietors of Charles river bridge chose a committee to defend the interest of the corporation against the attempts of all other persons to erect another bridge over Charles river to the town of Boston. This committee afterwards reported, "that according to their observation and judgment, the public opinion in favor of another bridge from Charlestown has continually gathered strength, from the real or pretended want of a commodious avenue to the centre of Boston; and believing that unless a law, authorizing a new bridge, should pass in the course of one or two years, the zeal for such a project will abate; and finally, being sensible that if a new bridge should ultimately be built, every year's delay will be of important value, they have concluded that it would be highly prudent to assist and promote the establishment of a street over the mill-pond, from Charles river bridge to Middle street; and accordingly have engaged, in behalf of the proprietors, to pay the sum of 12,000 dollars, to accelerate the making and finishing said street," &c. This report was accepted, and 10,500 dollars appropriated to fulfil the engagements of the committee.

In June 1806 and January 1807, the college chose committees to present memorials to the legislature relative to a contemplated bridge or bridges over Charles river, and to take measures to secure the interests of the college.

At the session of the legislature in June 1806, on the petition of Christopher Gore and others, praying leave to erect a bridge from Lechmere's Point, in Cambridge, to Barton's Point, in Boston, the petitioners were ordered to notify all parties, by publishing the petition, and the order, in certain newspapers printed in Boston, sixty days at least before the next session, to appear and show cause why the petition should not be granted.

In a report of a committee of both houses, in February 1807, upon several petitions and remonstrances respecting the bridge from Lechmere's Point to Barton's Point, the committee say, that "after examination and due reflection on the various grants of bridges across Charles river, and the pretended con-

flicting rights, they can discern nothing in the said grants or the supposed rights of other corporations, or in the principles of justice and equity, that can be construed into an abridgment of the power of the legislature, to authorize the erection of any other bridge."

On February 27, 1807, an act was passed, authorizing the building of the Canal bridge, from the northwestwardly end of Leverett street, in Boston, to the east end of Lechmere's Point, in Cambridge. By this act the proprietors of Canal bridge are to pay to the proprietors of West Boston bridge 333 dollars and 33 cents, for every year that both corporations shall exist; and the proprietors of West Boston bridge are to continue to be a corporation for the term of seventy years from the time when Canal bridge shall be completed, and during that term are to receive toll and to pay 666 dollars 66 cents annually to the college. The act contains no provision in favour of the proprietors of Charles river bridge.

By an act of June 21, 1806, the "Proprietors of Prison Point Dam Corporation" were authorized to build a dam from Prison Point in Charlestown to Lechmere's Point in Cambridge, and in 1815 and 1816 certain persons claiming to act under the right granted to that corporation, built a bridge from Prison Point to the Canal bridge, the junction being within the town of Cambridge.

In January 1828, John Skinner and others offered a petition to the legislature, alleging that the public convenience and necessity required another avenue between Charlestown and Boston, and praying to be empowered to build a bridge commencing on the southerly side of Charlestown square, and running to a point on the Mill pond lands, near Mill creek, in Boston.

At the same session of the legislature, the proprietors of Charles river bridge offered a memorial, in which they state, among other things, that if the present bridge does not give every reasonable facility and accommodation to the public, they hold themselves ready to accomplish any thing, even to the extent of building another bridge, in any way pertaining to the convenience and accommodation of the public; and that if the avenue to the bridge on the Charlestown side is thought to be

inconvenient, they are willing to make it of any given width which the legislature may authorize. The memorial contained a vote, "that the proprietors of Charles river bridge will, at any time hereafter, make all such additions, alterations and improvements in and upon said bridge and the avenues connected with it, as the legislature shall at any time authorize and direct."

The committee of both houses of the legislature, to whom the last mentioned petition and memorial were committed, made a report stating the grounds relied on in support of the petition, and those taken on the other side. Of these last, one was, "that the grant of another bridge, with or without tolls, in whole or in part, and without adequate indemnity to the proprietors of the existing bridge, would be an infringement of their just rights and a violation of the public faith." The committee say, that "they are of opinion, that public convenience and necessity require, and that public justice does not militate against the grant of a charter for another bridge from Charlestown to Boston, to be erected within the termini and on the conditions prayed for by the petitioners."

The statute of 1827, *c.* 127, (passed March 12, 1828,) to establish the Warren bridge corporation, authorizes the corporation to build a bridge across Charles river, from or near the wharf in Charlestown, late the property of John Harris, deceased, to the newly made lands in Boston, near the Mill creek. By § 4, "the corporation shall be holden to make compensation to any person, persons or corporation, whose real estate shall be taken for the use of said bridge," and if there should be a difference of opinion as to the value of the same, either party may apply to the Court of Common Pleas for a committee to estimate the damage; "provided, that in all cases either party may claim a trial by jury, as in similar cases where lands are taken for public uses." In § 6, for the purpose of reimbursing the proprietors the expenses of building and supporting the bridge, the same toll is granted to them as was granted to the proprietors of Charles river bridge, and when they shall be reimbursed their expenses, with five per cent. interest thereon, the bridge is to revert to and become the property of the commonwealth; but the term for taking toll by the proprietors is not to exceed

six years. By § 8, at the expiration of one year from the time of opening the bridge for passengers, and annually thereafter until the bridge shall revert to the commonwealth, the proprietors "shall pay out of the income accruing from tolls, one half the sum now required to be paid to Harvard College or University annually by the proprietors of Charles river bridge, and the said proprietors of Charles river bridge shall be exonerated from paying to said college or university, so much as is hereby required to be paid by the proprietors of the Warren bridge."

There was a meeting of the proprietors of Charles river bridge, on April 1, 1785, at which meeting the corporation was organized. The bridge was finished and opened for passengers on June 17, 1786. The aggregate of tolls received from June 1786 to January 1827, was 824,798 dollars.

In the depositions of witnesses it was stated, that for a long time prior to 1785 there had been a regular ferry between Boston and Charlestown, which was reputed to belong to Harvard College; and that there was no other ferry nor any other regular established means of communication between the two towns. The landing places were covered by the ends of Charles river bridge. When the bridge was built, it accommodated the same line of travel as the ferry, so that immediately after the bridge was opened for travellers, the ferry boats ceased to be used. From that time there was no ferry or other regular means of communication across Charles river between Boston and Charlestown, except by this bridge, until the West Boston bridge was erected under the act of 1791.

The proprietors of Charles river bridge took double toll on the Lord's day for several years; but about the time of passing the act of 1791, or soon after the West Boston bridge was built (the witnesses could not specify the precise time), they ceased to demand the double toll, and it has never since been exacted. One witness recollected that he paid double toll once after the 22nd of May 1792. The records of the proprietors did not contain any vote or directions to their agents to discontinue taking the double toll; and by the rules of the corporation, it is made the duty of the clerk to record the votes and transac-

tions of the stockholders and of the directors. Persons have at all times since the bridge was built, both before and after 1792, crossed Charles river in boats, on Sundays and other days, and there was no evidence that they were ever prohibited from crossing in any direction : neither was there evidence that the owners of the boats had ever demanded toll.

The distance between the northerly ends of Charles river bridge and Warren bridge, on the Charlestown shore, is 260 feet. The avenues from them lead to Charlestown square, converging from the bridges to the square, where the distance between them is 26 feet 3 inches. The distance from the northerly end of Charles river bridge to the square is 426 feet ; and the distance from the northerly end of Warren bridge to the square, is 390 feet. Charlestown square is the principal place of business in that town, and through which much the greatest part of the travel between Boston and Charlestown usually passes. The distance between the southerly ends of the bridges, on the Boston shore, is 915 feet in a direct line across the water. Charles river bridge communicates with Charlestown street and other streets, leading into the city of Boston. Warren bridge communicates with Haverhill and Causeway streets leading into the city. Charlestown and Haverhill streets are the principal avenues leading respectively from the two bridges into the central part of Boston and the part at which the mercantile business is chiefly transacted. These two streets converge from the bridges and intersect each other at a point on the mill-pond, so called. The distance from the southerly end of Warren bridge to the point of intersection is about 1463 feet, and from the southerly end of Charles river bridge to the same point is about 1385 feet. Warren bridge is 1390 feet long, and Charles river bridge is 1323 feet. So that the whole distance from Charlestown square to the intersection of Charlestown and Haverhill streets, is 3134 feet by the way of Charles river bridge, and 3243 feet by the way of Warren bridge.

Warren Bridge would accommodate the whole of the travel which now passes over Charles river bridge, and the whole travel which will pass over Warren bridge, would, if that bridge had not been erected, pass over Charles river bridge. Persons

going from Charlestown square to the westerly part of Boston, would probably go over Warren bridge, the distance being less than over Charles river bridge; to other parts of the city the distance is not less by the way of Warren bridge.*

In Charlestown, at the distance of 1300 feet from Charlestown square, is a street, called Austin street, leading from Main street to Prison Point. Austin street, Prison Point bridge and Canal bridge, afford a convenient avenue from the upper part of Charlestown to the westerly part of Boston, and many persons pass that way; but in comparison with those who pass over Charles river bridge, their number is small.

The end of Warren bridge on the Boston shore is on what constituted, in 1786, the old Mill Pond, and at that time the land to a considerable distance east and west was covered with water. The southerly end of Charles river bridge was placed on the most westerly part of Boston at which a bridge could then be conveniently placed on solid ground, leading from Charlestown square to the central part of Boston. The westerly part of Boston, in 1786, contained scarcely any inhabitants. The population and business of that part of Boston which lies west and south of a continuation of the line of Charles river bridge, has increased since 1785 much more than the population and business of the part which lies east and north of the same line. Much the greater part of the inhabitants of Boston

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* The map, though perhaps not exact in regard to distances, shows with sufficient accuracy the relative situation of the several bridges and ferries in the neighbourhood of Boston, which are referred to in the case. They are denoted by numbers as follows :—

1. Charles river bridge.
2. Warren bridge.
3. West Boston bridge.
4. Canal (often called Craigie's) bridge.
5. Prison Point bridge.
6. Malden bridge, at the place of Penny ferry.
7. Chelsea bridge.
8. Winnesimet ferry.
9. South Boston bridge.
10. South Boston free bridge.
11. Cambridge bridge.

Entered according to Act of Congress by A. Bowen.

A. Bowen Sc.

BOSTON AND ENVIRONS.

reside to the west and south of a line formed by a continuation of Haverhill street. The number of inhabitants in Boston in 1785 was conjectured to be about 18,000; in 1825 it amounted to 58,281. The inhabitants of Charlestown in 1785, were supposed not to exceed 1000; in 1820 the number amounted to 6,591. The population of the neighbouring towns has likewise increased very much since 1785.

The act of 1784, incorporating the proprietors of Charles river bridge, was at an early period recorded in their book of records, but no vote accepting that act, previous to one passed in 1826, is found on their records. At a meeting of the proprietors July 13, 1802, it was voted, that the clerk be directed to record the parts of the act of 1791 which relate to the Charles river bridge. At a meeting February 15, 1826, the proprietors recite, that an act was passed on the 9th of March 1792, for incorporating the proprietors of West Boston bridge; that they had remonstrated against the erection of that bridge as an infringement of their rights, and had claimed an indemnity, and the provision in that act extending their interest in their bridge for the term of seventy years &c. was taken, deemed and accepted by them as an indemnity for the loss and diminution of emoluments which they would sustain by reason of the erection of the new bridge; that the act provided that they should relinquish the additional toll on the Lord's day, and that they did, from and after the passing of the act, relinquish it; and that by such relinquishment, by ordering such clauses in the act as related to them to be recorded among their records, and by divers other proceedings, they manifested their acceptance of the act, but that no express vote appears on their records accepting the same; they then say, "Now therefore, as well for the purpose of ratifying and confirming all the acts, doings and proceedings of this corporation, its officers and agents, manifesting an acceptance of the provisions of said act, as for placing on their records an express vote to that effect, *voted*, that an act passed on the 9th day of March 1792, entitled, &c. with all the terms, conditions and limitations therein contained, so far as the same in any manner apply to this corporation, be and the same are hereby accepted."

After West Boston bridge was built, a great proportion of the travel to Boston which passed through Cambridge, and which before that time passed over Charles river bridge, was diverted and passed over West Boston bridge. When Canal bridge was erected, which was in 1816, it diverted travel from both of the other bridges.

The proprietors of Warren bridge were organized April 14, 1828, under their act of incorporation. A by-law was passed on that day, authorizing the directors to build the bridge. On December 25, 1828, the bridge, being completed, was opened for passengers.

The tolls received at Charles river bridge from the 5th to the 20th of January 1829, being sixteen days, amounted to 466 dollars. The amount of tolls received in the same period at Warren bridge was 707 dollars. From January 5, 1829 to April 2, the amount of tolls at Charles river bridge was 2423 dollars, and at Warren bridge, 3755 dollars. The amount received at Charles river bridge from December 25, 1828, to June 30, 1829, was 6525 dollars; the amounts received during the corresponding periods of 1825 and 1826, of 1826 and 1827, and of 1827 and 1828, were respectively, 15,631 dollars, 15,356 dollars, and 14,911 dollars.

At a meeting of the directors of Charles river bridge corporation, September 22, 1786, it was voted, "that the treasurer have an order to pay the corporation of Harvard College." On October 20, 1786, they voted that the treasurer pay the college "to the first of October instant, and after that to pay them quarterly." There is no vote on the records of the proprietors of Charles river bridge by which they agree to be bound to pay the college. The foregoing votes are the only ones found relating to the subject. The annuity of 200*l.* reserved to the college by the act of 1784, has been received by their treasurer from the treasurer of the bridge, in quarterly payments, ever since October 1, 1786. The payment made on that day was 56*l.* 13*s.* 4*d.* and was in full to that date.

On July 7, 1829, the treasurer of the college received of the treasurer of Warren bridge 166 dollars 67 cents, for six months' annuity, from December 25, 1828, to June 25, 1829;

the payment being made in pursuance of the provision in the act incorporating the proprietors of that bridge.

Formerly there was a ferry, called Penny ferry, over Mystick river, leading from Charlestown and Malden. About the year 1787, certain persons incorporated for the purpose, built Malden bridge at the same place, whereby the ferry was destroyed. There was no evidence that any compensation was made to the owner of the ferry.

About the year 1803, Chelsea bridge was built over Mystick river between Chelsea and Charlestown. This bridge is about a mile and a quarter from Malden bridge, and the end on the Chelsea shore is not more than fifty rods from the ferry-ways on the same shore, of Winnesimmet ferry. This ferry between Chelsea and Boston is about a mile and three quarters in length, across an arm of the sea. Chelsea bridge diverted a great deal of travel from Malden bridge, but in the act of March 6, 1802, authorizing the erecting of it, there is a recital, that it is agreed that the Malden bridge corporation shall have the property of half of the Chelsea bridge and pay half of the expenses of the same bridge. The Winnesimmet ferry was much injured, first by the erection of Charles river and Malden bridges, and afterwards by the erection of Chelsea bridge; but the owner of the ferry never received any compensation for these injuries, though he presented to the legislature a remonstrance against the erection of Chelsea bridge.

The free bridge from Boston to South Boston diverted much travel from the old bridge between these two places; and the mill-dam between Boston and Roxbury caused a diversion of travel from West Boston bridge; but in neither case did the legislature provide for an indemnity to the suffering party.

It did not appear, that in either of the cases before mentioned, the party sustaining damage had resorted to any legal process to obtain redress.

Shaw for the plaintiffs. The facts stated in the bill are in general admitted by the defendants. Of the allegations denied in the answer, one is, that there was an ancient ferry from Boston to Charlestown and no other convenient mode of transportation between the two towns. The proof of this allegation

rests in legislative acts, tradition, history and ancient records. The evidence establishes the fact, that the ferry had its commencement as early as the year 1631.

The defendants deny that the proprietors of Charles river bridge ever accepted the act of 1784. It appears, that they organized themselves as a corporation immediately after the act was passed, and built the bridge. These facts are sufficient proof of an acceptance.

It is further denied, that the ferry was granted to Harvard College. We rely on the act of the general court of 1640, which declared, that "the ferry between Boston and Charlestown is granted to the college," and the subsequent acts which are in the case, recognising and confirming the grant; and on the proceedings of the college in relation to the ferry. Even before the year 1640 the profits were received by the college, and they were the reputed owners from that period until the year 1786.

If the college owned the ferry, the defendants deny that the legislature could grant it to the plaintiffs. But the college acquiesced in the transfer, upon receiving an annuity in recompense. The defendants say that the college did not assent to the grant of the plaintiffs' charter, and had no knowledge of it; but the receipt of the annuity implies assent, as well to the extension of the charter as to the original grant; and in the memorial of the college in 1792, their assent to the charter is expressly recognised.

The defendants deny that the act of 1791 was accepted by the plaintiffs. Their proceeding in conformity to its provisions was an acceptance; and further, that act being in their favor, an acceptance is to be presumed. But, *ex majori cautelâ*, before the expiration of the first grant they passed a vote expressly accepting the extension of their charter.

It is denied that there was any vote to relinquish the double toll on Sunday. Such a vote was not necessary. Simply omitting to take the double toll was sufficient; and it appears that the plaintiffs have never exacted it since 1792.

The defendants deny that the plaintiffs have paid to the college the annuity provided for in the acts. The proof of the payment is complete.

They deny that they had an intent to divert the toll from our bridge. Our allegation was made without much consideration, but it is sustained by the evidence. For in the defendants' petition to the legislature, they set forth the necessity of relief from the burden of heavy tolls, which the public now pay at Charles river bridge, (though it is difficult to perceive how another bridge with the same tolls will relieve the public,) and that the proprietors of Charles river bridge have already received a much greater compensation than was contemplated by the legislature.

They deny the allegation, that the corporation defendant have no real or personal estate to respond damages which the plaintiffs may recover for any injury they may sustain. Whether they have such property or not, depends on the question, whether they have a right to take toll.

They deny that all the travel referred to in the bill has always heretofore, and must, as the highways now are, pass over Charles river bridge, if the Warren bridge should not be constructed. Our allegation is to be taken in connexion with the rest of the bill. It means that the direct travel between Boston and Charlestown would pass over our bridge; and this is proved by the evidence in the case. It is true there is a way over Canal bridge and Prison Point dam bridge, but that is through Cambridge. We do not allege that there is no circuitous travel between Boston and Charlestown.

They deny that the college discontinued the ferry. In a technical sense it may be true; but in a popular sense it is otherwise, for it is clearly proved that the boats ceased to ply, after the bridge was finished.

They allege that our bridge is a monopoly. A monopoly gives an advantage without a consideration. But here there was a consideration. They say that a grant of exclusive privileges, except for services already rendered, is contrary to the bill of rights. Can any good reason be assigned why such a grant should not be made in consideration of future services? Patents under the laws of the United States are always granted with a view to subsequent benefit to the public. It is said that the erecting and maintaining of our bridge were not contem-

plated by the legislature as highly important and beneficial services to be rendered to the public; in answer, we would only refer to our act of incorporation.

The defendants do not distinctly deny that the Warren bridge will accommodate the same line of travel as our bridge; and it appears in fact, that of the tolls taken at both bridges, about two thirds are received at the Warren bridge.

The great question in the case is, whether the plaintiffs have an exclusive right to maintain a bridge and collect the tolls; exclusive to the extent set forth in their bill, so that the erection of the Warren bridge is, in respect to the plaintiffs, a nuisance.

By the operation of their act of incorporation, by their acceptance of it, and by the assent of the college, they became the successors and assignees of the college in regard to this ancient ferry. The word *assignment* is to be taken in relation to the subject-matter. Here three parties must concur. The government must yield the franchise of building a bridge over navigable waters, in lieu of the ferry; the college must give up the ferry; and the plaintiffs must accept both. The plaintiffs are assignees in equity of the ferry right. The owner of a ferry cannot let it go down and build a bridge in its stead, without a grant. It would be a usurpation. *Pain* v. *Patrick*, 3 Mod. 294. The college would have been indictable, had they not been excused by the legislature, for letting the ferry go down, for a ferry is *publici juris*, and all the subjects have an interest in it. *Pain* v. *Patrick*, *ubi sup.* What is the nature of a ferry? It is a franchise; a right and duty to keep boats for the transportation of passengers. It is an incorporeal hereditament. In a ferry are embraced several rights:—1. A right to use the land on each side of the water as a landing-place. *Ipswich* v. *Browne*, Sav. 11, 14; *Rex* v. *Nicholson*, 12 East, 330; *Peter* v. *Kendal*, 6 Barn. & Cresw. 703. 2. The right of franchise; which may be in the government, a subject or a corporation. 3. The *jus publicum*, or the right of all the subjects to use the ferry. 4. The *jus regium*, or the right of the government to make salutary regulations concerning the ferry. 5. The eminent domain or the right of appropriating the property or franchise to the public use, when necessary to the pub-

lic welfare. 2 Dane, 683, *tit. Ferry*, cites most of the authorities.

The evidenee that it was intended that the proprietors of Charles river bridge should be the owners of the ferry, is their act of ineorporation. The compensation given by them for the ferry shows that the bridge was to be a substitute. It was a matter of purchase. The right is saved to the eollege, of having, at the expiration of forty years, afterward extended to seventy, the sanie revenue whieh it would then have had from the ferry in case the bridge had not been built. The bridge too is built at the place of the old ferry-ways.

The plaintiffs having then become the owners of the ferry, it is to be considered how far the franchise was exclusive. We say that the government were precluded from establishing another ferry between the two peninsulas of Boston and Charlestown; and though it is sufficient for us to show that there was no right to set up another ferry within a few feet of the old landing plaees, yet the evidenee is conelusive of our right to the extent just stated. All the other bridges over Charles river connected with Boston are between Boston and some other town than Charlestown.

Without defining precisely what are the limits to whieh the exelusive right of a ferry extends, it is clear that it must have a reasonable extent, and at all events, a new ferry must not accommodate the same line of travel. "If a ferry is erected on a river, so near another aneient ferry as to draw away its eustom, it is a nuisance to the owner of the old one." 3 Bl. Com. 219; *Tripp* v. *Frank*, 4 T. R. 666; *Ogden* v. *Gibbons*, 4 Johns. Ch. R. 159, 160. If the new one is ereeted very near to the old one, it is by intendment of law a nuisance; if at a considerable distance, the question of nuisance is to be tried by a jury. The Warren bridge is between the same termini as the ferry, and is ineontestably so near as to draw away the eustom. *Yard* v. *Ford*, 2 Saund. 172.

Nor will the king's grant prevent the new ferry from being a nuisance to the old one, though an *ad quod damnum* may have been executed. An *ad quod damnum* is issued *ex majori cautelâ*. But the grant of a new ferry, fair or market, is always

made *on condition* that it do not affect any existing ferry, fair or market. But even if this clause were omitted, the law would imply it and give a remedy in an action on the case for a nuisance. *Yard* v. *Ford*, 2 Saund. 172; 2 Inst. 406; *Rex* v. *Sir Oliver Butler*, 3 Lev. 222.

The right of the ferry then in the college being exclusive at least so far as to embrace the place where the defendants have built their bridge, the plaintiffs, having for a valuable consideration succeeded to the owners of the ferry, must be deemed to have the same exclusive right. After the passing of the act of 1784 and the acceptance of the annuity, the college would have been liable to our action for a disturbance, if they had continued to keep up a ferry, or to a *quo warranto* at the suit of the commonwealth.

But the plaintiffs are entitled to the right which they claim, by their act of incorporation and the additional act of 1791. These acts passed by the legislature, and accepted, acted upon and complied with by the plaintiffs, constitute a *contract*, by which the plaintiffs acquired an incorporeal hereditament; being a valuable property, consisting in the franchise of being a corporation and taking the tolls mentioned in the acts, for the term of seventy years. By the constitution of the United States, the legislature had no right, directly or indirectly, to impair this contract in the slightest degree. *Fletcher* v. *Peck*, 6 Cranch, 87; *New Jersey* v. *Wilson*, 7 Cranch, 164; *Terrett* v. *Taylor*, 9 Cranch, 49; *Dartmouth College* v. *Woodward*, 4 Wheat. 516; *Green* v. *Biddle*, 8 Wheat. 84; *Wyman* v. *Southard*, ibid. 50.

What then is the true construction of this contract, and the extent of the grant?

It was intended to be a beneficial grant. The bridge is recited to be a work of public utility and of great hazard. The proprietors are to erect and maintain it at their own charge, and to pay an annuity to the college, and at the termination of their charter, are to surrender the bridge to the government in good repair. The toll is granted for their "sole benefit" for the purpose of reimbursing them their expenses.

But in order to be beneficial, the grant must be exclusive. The contemplated reimbursement depended upon receiving the

tolls at the rates specified, upon all the carriages &c. therein mentioned, including the whole line of travel between the termini. The rates of toll being fixed, if another bridge is placed so as to take a portion of the carriages &c. in the same line of travel, at the same or a reduced rate of toll or without toll, the toll established for the plaintiffs' sole benefit is in part taken away. The income thus reduced may not be sufficient to keep the bridge in repair, but the plaintiffs are notwithstanding obliged to keep it in repair and to pay the college annuity.

A grant is always to be so construed as to effect the intent of the parties, and a necessary implication will have the same force as express terms. Although not expressed, the grantee is to have all that is essential to the taking and enjoying of the thing granted. Co. Lit. 56 *a*; Finch's Law, 100; Plowd. 317; *Darcy* v. *Askwith*, Hob. 234; *Liford's case*, 11 Co. 52; Perk. § 111, 116; Bro. Abr. *Incidents*, *pl.* 8, and *Nusans*, *pl.* 14, cites 9 E. 4, 35; *Saunders's case*, 5 Co. 12; 1 Wms. Saund. 323, note 6; *Allen's case*, Owen, 113; *Gayetty* v. *Bethune*, 14 Mass. R. 56. What was the substance of this grant? Not the strip of land forty feet wide occupied by our bridge; not a right of way; not a mere license to build a bridge over navigable waters;—the substance of the grant was, the right to take certain tolls for certain carriages &c. on a given line of travel. In order to be beneficial it must be exclusive.

If we attempt to ascertain the intent of the parties from the nature and subject-matter of the grant itself, we come to the same result. The construction uniformly put upon similar grants, whether for ferries, turnpike roads, bridges, or the like, is, that the grant of the tolls upon passage necessarily excludes such competition as would materially diminish the tolls. *Newburgh Turnp. Co.* v. *Miller*, 5 Johns. Ch. R. 112; *Ogden* v. *Gibbons*, 4 Johns. Ch. R. 161; *Livingston* v. *Van Ingen*, 9 Johns. R. 568, 573.

The intent of the parties will be rendered still more clear, if the charter is considered in reference to the local circumstances of the bridge and its termini, and the object had in view at the time of the grant. The object expressed in the title of the act, was to build a bridge between Boston and Charlestown. At

that time the two peninsulas approached each other in a manner very different from what they do at this day, and the streets on both sides led towards the termini of the bridge. All the travel between Charlestown square and Boston must have been contemplated in the act.

One mode of determining whether the plaintiffs have any exclusive right to the franchise of taking toll is, by inquiring whether they could have maintained any action for injurious competition. Toll bridges are rare in England, and therefore the authorities relate more frequently to ferries. A ferry is a franchise derived from the king's prerogative, which cannot be set up without the king's license. When so erected, a person cannot erect another to the nuisance of it. *Churchman* v. *Tunstal*, Hardr. 163. If he does, an action on the case lies. 3 Bl. Com. 318 *et seq.* And such action lies, notwithstanding the second ferry may have been set up under the king's license and after an *ad quod damnum* executed. Hale *De Port. Mar.* (Hargr. Tr.) 59; *Rex* v. *Sir Oliver Butler*, 3 Lev. 221; *S. C.* 2 Ventr. 344. A *scire facias* for repealing a patent may be sued by a person prejudiced thereby, as well as by the king. *Brewster* v. *Weld*, 6 Mod. 229; Com. Dig. *Patent, F*, 4, 5, 6, 7; 2 Wms. Saund. 72, note 4; 4 Inst. 88. It is clear then, that an action will lie for a disturbance in fact of a ferry; and this proves that a right of ferry is an exclusive franchise.

In this respect a bridge is like a ferry. It cannot be set up without the king's license. Either is a part of a highway. In erecting a bridge there is a greater outlay of money, on the sole chance of being reimbursed by the tolls; so that the case is stronger than that of a ferry.

Without reference to the act incorporating the proprietors of the Warren bridge, the plaintiffs have made out, *primâ facie*, a case of property. The defendants deny the exclusive right which we claim, and they set up their own right under their act of incorporation.

The defendants say we have only a license to erect a bridge; a license to use a strip forty feet wide, of flats and river, and to get all the tolls we can of persons going over the bridge. A license is merely for the private convenience of the grantee, as

to build a wharf or dam for private use; a bridge *ex vi termini* implies public use. The proprietors of a bridge would be indictable for suffering it to be out of repair.

The defendants justify and claim a right to erect and maintain their bridge, without compensation to the plaintiffs for the loss they may sustain, by force of the act of the legislature.

We say this act does not purport to divest, restrain or limit the rights of Charles river bridge. It is in its terms simply a grant. It is therefore to be construed as an act granting such rights as the legislature had a right to grant, and no more. As against the public, it gives the grantees a right to obstruct navigable waters and to take toll; but it does not purport to authorize an invasion of private rights. And if it did in the most express terms, it would be mercly void and inoperative. It follows, that if the Warren bridge is an encroachment upon the rights of the plaintiffs, the defendants are amenable to them in the same manner and to the same extent as if there had been no legislative act. *Jackson* v. *Catlin*, 2 Johns. R. 248; *Catlin* v. *Jackson*, 8 Johns. R. 406.

The case then is brought to this question, whether, if no legislative act had been passed, the plaintiffs could maintain an action against the defendants. The grant to the plaintiffs was, to some extent, exclusive, or it was simply a license to use a strip of land and water forty feet wide and take toll of such persons as should pass over it. If it was in any degree exclusive, either by express terms or by necessary implication, the legislature are in that degree restrained from making any other grant. If the plaintiffs had only a license, as above mentioned, then the defendants, without any act of the legislature, might have erected another bridge by the side of Charles river bridge immediately after this bridge was built and before the plaintiffs had received any benefit from it, and yet would have been liable to no action by the plaintiffs; and it is no answer to say they would have been liable to an indictment for a public nuisance.

The only way of avoiding the alternative above stated, is to maintain, that the grant to the plaintiffs was to a certain extent exclusive, but that such exclusive grant was subject to the implied condition, that whenever the public exigency should require anoth-

er bridge within the limits of such exclusive grant, the government reserved to itself the right, without compensation or indemnity, to erect such other bridge, and that of this exigency any future general court were to be the sole and exclusive judges. It is only necessary to state this proposition to show its inconsistency with all sound and just notions of private right. In a matter of contract between the government and its subjects, in relation to property, the grant of a particular revenue or toll, exactly specified, for a definite term, without any apparent reserve or condition, there is a *tacit* reservation on the part of the government of a right to resume, within the term, the whole substance of the grant or to convey it to others! A doctrine so dangerous derives no sanction from the common law. In England, a second grant, if it impairs a preceding one, let the public exigency be what it may, is deemed void, not only as against the first grantee, but as against the crown, it being considered as improvidently made. How does this case of a franchise differ from that of land, which is derived from government? Land is subject to be resumed for roads, &c. but it is upon granting an adequate compensation. The substance of our grant is a right to take tolls. This is the only beneficial part of it; all the rest is burdensome. If the government have tacitly reserved such a right as above described, they may determine how it shall be exercised, and they may appoint a man to take the tolls for their own use. And it is manifest from the Warren bridge act, that the government are taking away the tolls for their own benefit; for in six years, or sooner, that bridge is to revert to the commonwealth. There will then remain twenty years before the charter of Charles river bridge will expire, during which the government will be receiving the revenue of the Warren bridge; nor must they omit to receive it, for then that bridge will be a greater nuisance to us than it is at present. Can the legislature thus draw into its treasury the tolls before granted to us?

The authority relied on by the defendants to erect their bridge, is inoperative and void, in so far as it impairs the rights of the plaintiffs; being repugnant to the constitution of the United States, by impairing the obligation of contracts; and

repugnant to the same constitution and to the constitution of Massachusetts, by appropriating the private property of the plaintiffs to the public use, without providing any compensation.

It has already been shown, that the acts of 1784 and 1791, granting and extending the plaintiffs' charter, constitute a contract, and which is exclusive to a certain extent; that the Warren bridge is erected within that extent; and that it diminishes in a great degree the amount of the plaintiffs' tolls, and in the same degree diminishes the value of their franchise. It has been determined, that the clause in the constitution of the United States applies as well to executed as to executory contracts; to grants, as well as to covenants and other contracts. *Fletcher* v. *Peck*, 6 Cranch, 87. And any legislative act which impairs the title or diminishes the value of the right, property or interest created or vested by a grant, does impair the obligation of a contract, and is thus far, and for this cause, null and void.

Has the Warren bridge act provided any compensation to the plaintiffs, agreeably to the constitutions of this state and of the United States?

In the 10th article of our bill of rights, it is declared, that "whenever the public exigencies require, that property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." The provision in the constitution of the United States is, "nor shall private property be taken for public use, without just compensation." These provisions, made for the security and protection of the subject, are to have a benign and liberal construction. All kinds of property are to be protected; and "taking" or "appropriating" necessarily includes all means by which the title or beneficial interest in such property may be divested or diminished. The construction uniformly put upon these clauses, and which is necessary in order to render them effectual as security, has been, that the provision for compensation must be made simultaneously with the act giving the authority to take the property, and unless this is done, the authority is void. *Gardner* v. *Newburgh*, 2 Johns. Ch. R. 168; *Perry* v. *Wilson*, 7 Mass. R. 395; *Stevens* v. *Middlesex Canal*, 12 Mass. R. 468; *Callender* v.

Marsh, 1 Pick. 430 ; *Vanhorne's Lessee* v. *Dorrance*, 2 Dallas, 304.

In this case provision is not made for compensation. In the 8th section of the act of 1827 it is provided, that until the Warren bridge shall revert to the Commonwealth, the proprietors shall pay out of the income accruing from tolls, one half the annuity required to be paid to the college by the proprietors of Charles river bridge, and these proprietors are to be exonerated from paying such half. Our consent to this arrangement is not asked, and the payment by the Warren bridge is to be made out of tolls to which we have a right. The 4th section provides for an indemnity only where real estate shall be taken. The legislature have no right to determine the nature of the compensation, the amount of it, nor the mode in which it shall be ascertained. The damages are to be determined only by agreement or by a trial by jury. *Vanhorne's Lessee* v. *Dorrance*, 2 Dallas, 304.

In *Day* v. *Savage*, Hob. 87, an act of parliament, made against natural equity, is said to be void. Perhaps the expression may be too strong, as courts in England are subordinate to parliament ; but here the Supreme Court is a co-ordinate branch of the government, and any legislative act must be declared void, so far as it conflicts with the constitution. *Marbury* v. *Madison*, 1 Cranch, 137 ; 1 Kent's Com. 425 ; *Wilkinson* v. *Leland*, 2 Peters's Sup. Ct. R. 627.

The defendants allege that the legislature have always had the control of navigable waters and of public highways, ferries and bridges, and have been accustomed to proceed as they have done in this instance, without making compensation. We deny that there has been any such usage. But if there was before the constitution, it was repealed by the constitution ; and if such a usage has grown up since, it is repugnant to the constitution and has no more validity than a law would have.

It is said too, that the increase of population required another bridge. If that were true, it would not impair the plaintiffs' rights. *Mosley* v. *Walker*, 7 Barnw. & Cress. 40 ; *Mosley* v. *Chadwick*, ibid. 47, note. They offered to furnish such further accommodation for the public as the legislature should di-.

rect. At any rate, the public exigency did not require that their franchise should be taken away without compensation.

Several documents have been introduced, to show that the government have the right of regulating ferries. But such a right is not inconsistent with an exclusive property in the owner of the ferry. The government have never claimed the right of taking away tolls which they have granted.

Webster, on the same side, cited, to show that where there is an existing franchise, no part of it can be regranted unless there has been a forfeiture, *Rex* v. *Passmore*, 3 T. R. 199; *Rex* v. *Amery*, 2 T. R. 565; *Wales* v. *Stetson*, 2 Mass. R. 143; *Rex* v. *Vice Chancellor &c. of Cambridge*, 3 Burr. 1656; 2 Bl. Com. 37 :—As to the nature of a ferry, Termes de la Ley, *voc. Ferry;* Com. Dig. *Piscary B;* and how far it is a monopoly, 17 Vin. 88, *Prerogative &c. M. b;* 13 Vin. 208, *Ferry* :—As to the rule for construing the king's grant, and as to the effect of subsequent usage in the construction of a grant, 17 Vin. 152, *Prerogative &c. O. c;* *Blankley* v. *Winstanley*, 3 T. R. 286, 288, 291, note :—And to the point, that where a franchise, which existed in the hands of a subject with certain rights, revests in the king and is regranted, it passes with the same rights, Palm. 78.

Aylwin for the defendants. By the civil and common law, all navigable waters, inlets and arms of the sea, are recognised as public property; and roads, ferries and bridges are treated as matters to be regulated by the sovereign authority. Inst. *lib.* 2, *tit.* 1, § 2, 3, 4; Dig. *lib.* 39, *tit.* 2, *l.* 24; *lib.* 43, *tit.* 12, *l.* 4; Grot. *lib.* 2, *c.* 3, § 9; 2 Domat, *Public Law*, *bk.* 1, *tit.* 8, § 1, *no.* 7; Vattel, *bk.* 1, § 100, 244, 245; *Case of the Isle of Ely*, 10 Co. 141; Com. Dig. *Chimin*, *A* 1; Hale, *De Jure Maris*, *part* 1, *c.* 1; ibid. *c.* 3; 2 Inst. 38; 1 Hawk. P. C. *c.* 76, § 1; Finch's Law, 164, *c.* 14; *Hooker* v. *Cummings*, 20 Johns. R. 100. So by the Feudal law. 1 Bl. Com. 264. That they belong to the public domain and are subject to the control of the state, the decisions of this Court abundantly testify. *Commonwealth* v. *Coombs*, 2 Mass. R. 493; *Hood* v. *Dighton Bridge*, 3 Mass. R. 267; *Arundell* v. *M'Culloch*, 10 Mass. R. 70; *Commonwealth* v. *Charlestown*, 1 Pick. 165. In

Commonwealth v. *Breed*, 4 Pick. 404, the Court say, "The legislature has power to regulate and control all public highways and the navigable waters within the limits of the state. This power has been exercised from the commencement of our government." In the exhibits and in our statute books will be found ample evidence in support of this declaration. Anc. Charters, &c. 110, 280, 448, 623; *St.* 1796, *c.* 42.

Upon general principles therefore, and according to the earliest usage, the general court had the power to pass the act under which the defendants claim to erect their bridge, unless there existed some particular restraint taking the case out of the operation of their general jurisdiction. The burden rests on the plaintiffs to make out such restraint.

Before proceeding further, it may be well to examine whether the standing of the plaintiffs in court is made out by the consistency of the proof with their allegations.

It is alleged in the bill, that the act of 1791 was duly accepted and that the conditions on which it was to take effect were complied with. This the defendants deny. The doings relied on for proof of acceptance are the immediate entry on their records, of the portions of the act relating to their corporation; the discontinuance of the double toll; and a formal vote of acceptance passed before the expiration of their charter. The evidence proves that the entry referred to was not made till the 13th of July 1802, being ten years, instead of *immediately* after 1792. This entry, being an act in itself equivocal, was not sufficient to show an acceptance, and it was not made in due season. The vote of February 15, 1826, four months only before the expiration of the forty years, was clearly too late. The corporation had waited till the last moment, to ascertain what might be the possible disadvantages of an acceptance, and finding no burden, but on the contrary, immense benefits to flow from it, they passed the formal vote now relied on.

In the amended bill the plaintiffs deny that they ever solicited the acceptance of the report of the joint committee of the general court extending to them for twelve years the term of taking toll, or the enlargement of it by the legislature to thirty years. This then rebuts the presumption of an acceptance of

the additional act, earlier than 1826, from its being for their benefit. They assert that no application on their part was made for the new grant.

The extension might have been to their detriment, as they were required to relinquish the additional toll on Sundays; and the burden of maintaining the bridge during the enlarged period, in case of casualties which they affected to dread, might have more than counterbalanced the benefit. The stockholders might have paused on this question. For this reason then their assent is not to be presumed. *Union Locks and Canals* v. *Towne*, 1 New Hamp. R. 44.

The proof does not show an immediate relinquishment of double toll. The testimony of the witnesses on the part of the plaintiffs is merely of a negative character; while one witness on the part of the defendants testifies positively to the payment of it on the first Sunday after the 22nd of May 1792. To fulfil the intent of the legislature, there should have been an express relinquishment by a vote; otherwise there would be nothing to bind the corporation. *Ellis* v. *Marshall*, 2 Mass. R. 269.

Where an act is to be done, and no time is prescribed in which it is to be performed, it must be done within a reasonable time. Co. Lit. 208. That ten years after March 9, 1792, was not a reasonable time for the acceptance, can hardly admit of a doubt. *Hayden* v. *Stoughton*, 5 Pick. 528.

The act incorporating the proprietors of Warren bridge, is alleged by the plaintiffs to be invalid, because in effect it authorized the *taking* of private property for the public use, within the meaning of the constitution of the United States, and was an *appropriation* of it for the like object, within the true intent of the constitution of this commonwealth, which could not be done without at the same time providing a reasonable compensation.

The foundation on which this objection rests is controverted by the defendants. If any property has been taken, it is real property, and by the 4th section a provision for indemnity is made.

What is the nature of the property alleged to have been taken? Is it real or personal? A ferry is an incorporeal hereditament; Co. Lit. 6 *a;* and as considered by the plaintiffs

themselves, a franchise having locality. It falls within the definition of the civil law, of immovable property, and of the common law, of real property. By the common law it might have been demanded in a *præcipe quod reddat;* and by force of *St. Westm.* 2, *c.* 25, an assise of novel disseisin was given for it. 2 Inst. 409 ; Humphreys on Real Prop. 8.

But the defendants deny that any property of the plaintiffs has been taken or appropriated by the act in question. The claim of the plaintiffs is, in reality, to a mere naked right; to the exclusion of the public from the use of the navigable waters of the commonwealth for the purpose of transportation. Such a right cannot be property, within any known or practical meaning of the term, nor, if infringed, is there a taking or appropriating of *property* within the intent of either constitution. The community, in their sovereign capacity, being the owners of these navigable waters, possess the right of using them at their pleasure, unless they have imposed some legitimate restraint on themselves by compact. If they have not so restrained themselves, and they actually made such use of them as to affect the interests of the plaintiffs, it is *damnum absque injuriâ*, and falls clearly within the principle touching public rights, recognised in the case of *Callender* v. *Marsh*, 1 Pick. 418. See also *Thurston* v. *Hancock*, 12 Mass. R. 220.

Have the legislature so restrained themselves that they could not make the grant to the defendants, without the violation of a prior contract ?

In opposition to the plaintiffs' claim to an exclusive right, we make several objections.

1. The ferry was not an ancient or prescriptive ferry, in the legal import of those terms, as would seem to be implied from the statement in the bill, but originated in a grant known and shown to the Court.

This is clearly proved by the orders of the colonial government and other evidence in the case. In *Hull* v. *Horner*, Cowp. 108, Lord *Mansfield* says, " Any written evidence showing that there was a time when the prescription did not exist, is an answer to a claim founded on prescription." Co. Lit. 115 *a.*

2. The grant did not pass a franchise of a ferry, but merely the liberty of receiving the profits; and that only during the pleasure of the government.

In construing the order of 1640, by which "the ferry between Boston and Charlestown is granted to the college," the general course of legislation on the subject of this and other ferries may be well taken into view. In the preamble to a revised statute dated 1636, 1640, 1642, it is recited, that the government had given the *revenue* of the ferry for the encouragement of the college. Anc. Charters &c. 78. In 1659 the general court order, that "besides the *profit* of the ferry formerly granted to the college, *which shall be continued*," 100*l.* shall be paid yearly to the college, and this to continue during the pleasure of the country. Anc. Charters &c. 80. By a provincial act of 1695 it is provided, that boats shall be constantly kept on either side of the water at Charlestown ferry, the ferrymen on each side to have a separate interest, and that the ferry shall not be leased out otherwise; and that all the members of the general assembly shall be ferriage-free at all ferries, in their passing to and from the assembly. Anc. Chart. &c. 281. The *St.* 9 *Ann. c.* 1, recites that the treasurer of the college had attended with the lease of the ferry, which had several years to run, and enacts that *notwithstanding the lease*, there shall be *three sufficient suitable boats*, and that they shall be three several separate interests, not all of one town. It appears from the college records, that in 1780 the treasurer was directed to order the necessary repairs of the sheds on each side of the ferry, and to *lay the cost before the general court* for allowance. And further, the statute of May 16, 1781, (*St.* 1780, *c.* 42,) passed after the formation of the state constitution, manifests a continued control over this public right. That act prohibited the ferrymen from making a common stock of their interest, under a penalty; required that no master ferryman should be appointed by the college without the annual approbation of the selectmen of Charlestown; and declared that the appointment of ferrymen by the college, should not be for a longer term than one year. And last of all, the act of 1784 incorporating the proprietors of Charles river bridge, was made without asking the consent of the college and without

their interfering in its enactment. It appears then that none of the essential attributes of property belonged to or were exercised by the college, except receiving the revenue. The legislature constantly exercise the dominion which belongs to ownership; and although they do not withdraw the income, still they exempt from ferriage whom they see fit, and prescribe the manner in which the ferry shall be leased or managed; and at last, they deprive the college of the future increase of the income of the ferry, and fix its rate at 200*l.* for forty years to come.

Further, the college could not have taken any thing under the order of 1640, in the nature of an estate, for they were then a voluntary association. They could not be grantees. They were not incorporated until 1650; which is a strong circumstance to show that the grant was during the pleasure of the general court. 2 H. 7, 13, *pl.* 16.

3. If however the franchise of a ferry was granted, it was in no sense exclusive of the right to grant other ferries or bridges, but confined solely to the landing places.

The plaintiffs assert that the ferry had certain termini, namely, the lower or southerly part of Charlestown and the northerly part of Boston, and within these limits they allege it to have been exclusive. In terms the grant contained nothing exclusive, nor did it subject the college to any duty or obligation whatever for the support of the ferry.

No judicial construction of an original grant of a ferry is to be found in the English books. The cases relate solely to prescriptive ferries; and although the foundation of these is presumed to be laid in grant, and in practice they have received a most liberal extension, yet such a franchise excludes those only who interfere without right or authority. *Churchman* v. *Tunstal*, Hardr. 162; *Blissett* v. *Hart*, Willes, 508; *Anonymous*, 1 Ves. sen. 476; *Tripp* v. *Frank*, 4 *T. R.* 668; Cruise's Dig. *tit.* 34, § 8.

By the law of England, a ferry, although *sui generis*, is not inconsistent with the general principles of that law regarding highways. A public privilege and a private right unite to form a ferry; the public privilege of passing across the water, and the private right of carrying passengers and receiving the toll.

A prescription cannot be maintained against the public without the existence of some equivalent. In general, it cannot be claimed in a highway. In 22 Ass. *pl.* 58, it is said the complaint was that the toll was outrageous, and it was claimed as *toll-thorough*. *Thorpe* there said, that toll-thorough was an oppression of the people, and that it was against common right. Toll-traverse may be by prescription or grant; but toll-thorough cannot be by either grant or prescription. Fitz. N. B. (9*th ed.*) 227, note *c;* 2 Roll. Abr. 522, *Toll.* The inheritance of every man in the king's highway is prior to all prescription. *Smith* v. *Shephard*, Moor, 574; *Truman* v. *Walgham*, 2 Wils. 296; Keilw. 148, *pl.* 29. The king cannot grant toll to be taken in the highway, which is free; but pontage and murage may be granted, because there is *quid pro quo;* and no longer than the bridge is maintained for the use of the subjects, or the wall shall continue for the defence of the subjects, shall the toll be demanded. *Darcy* v. *Allin*, Noy, 176. At least the prescription must show an obligation to repair and maintain the way, to entitle the party to his claim of toll; and must reach back as far as the reign of Richard I. 2 Bl. Com. 29; 2 Inst. 238; Co. Lit. 113*b;* *Gravesend case*, 2 Brownl. & Gould. 181; *Nottingham* v. *Lambert*, Willes, 111. The English courts have been anxious to narrow these exclusive claims. *Wilkes* v. *Kirby*, 2 Lutw. 1519. So in this state. *Arundel* v. *M'Culloch*, 10 Mass. R. 70.

In the case at bar we contend, that there is neither a prescription nor a grant of a franchise. The ferry could not have been prescriptive, for there was no corresponding obligation imposed on the college to maintain it. But suppose there was an absolute grant in 1640, we say it was confined to the respective landing places of the ferry as they then existed. *Webb's case*, 8 Co. 92. In *Ipswich* v. *Browne*, Savil, 11, 14, it was held, that a ferry is in respect of the *landing* place, and not in respect of the water. 13 Vin. 208, *Ferry;* Com. Dig. *Piscary*, *B.* And in each ferry the land on both sides ought to belong to the owner of the ferry. Ibid.

The plaintiffs must contend, that a grant of a license by the legislature, coupled with an interest in its execution, not

merely passes the license itself, but prohibits succeeding legislatures from giving any other license of a like kind. The common law, it is apprehended, affords no countenance to such doctrine. The common law enables the owner of a franchise to prohibit any one *without license or authority*, from exercising a similar right to his prejudice. The text in the different abridgements is general. It is said, "If I have a ferry by prescription or an ancient ferry, and another erects a ferry near the ancient one, case lies." 2 Roll. Abr. 140, *pl.* 4. *Rolle* cites 22 H. 6, 14 *b*, as the authority for holding it to be a nuisance. Comyn, in his Digest, *tit. Action upon the Case for a Nuisance, A*, quotes *Rolle*, and adds no other authority except *Churchman* v. *Tunstal*, Hardr. 162, which disproves the position. *Hale* (in Fitzh. N. B. 184, note *a*,) cites the same Year Book, 22 H. 6, 14, and Blackstone (3 Com. 219) cites Hale.

The judicial colloquy recorded in the Year Book is shortly this. On a question whether an action would lie for establishing a second mill in the same town where there was already one, of ancient continuance, it was resolved in the negative. *Paston* puts this case. "If I have a market on Saturday, and another levies a market or a fair on the same day in a vill which is near to my market, so that my market or fair is impaired, I shall have against him an assise of nuisance or action on my case. And the same law is, if I have of *ancient time* a ferry in one vill and another levies another ferry *near to my ferry*, so that the profit of my ferry is impaired by it, I shall have against him an action on my case." *Newton* replies, "Your case of a ferry differs from the case at bar, for in your case you are holden to sustain the ferry and to serve it and repair it for the ease of the common people, and may be *grievously* amerced; and this is inquirable before the sheriff's tourn, and also before the justices in eyre." Here the discussion was on a prescriptive ferry. That the doctrine is true of a *wrongdoer's* interfering with an ancient ferry, we need no authority from the Year Book to prove. But when it is pressed against one claiming to act under a license from the government, the rule is carried to an unwarrantable extent. Some express decision should be required.

In *Blissett* v. *Hart*, Willes, 512, note *a*, it was held, that a ferry is *publici juris ;* that it is a franchise ; that no person can erect one without a license from the crown, and when one is erected, another cannot be erected without an *ad quod damnum.* If a second is erected *without license,* the crown has a remedy by a *quo warranto,* and the prior grantee has a remedy by action.

The expression that a second ferry may not be erected *without license,* implies that *with* license it may be erected.

In 1 Hayw. N. Car. Rep. 459, on an appeal from an order of the county court authorizing a ferry to be kept at or near the place of one previously established, the Superior Court were divided. *Stone* J. says, "The county court are empowered to establish ferries. They are the proper *judges* where it is fit to establish them. There are two ferries established at the same place in several parts of this state. This proves the power of the county court to establish them." See also *Long* v. *Beard,* 3 Murph. N. Car. Rep. 57; *Stark* v. *M'Gowen,* 1 Nott & M'Cord, 395.

It does not appear that an authority for setting up a ferry was always considered indispensable by the English courts. The great question in *Churchman* v. *Tunstal* was, whether the owner of land on each side of the river, who set up a ferry, was not in effect authorized to do so by his ownership, without any license. An injunction was applied for to restrain the defendant, who had set up a ferry within three quarters of a mile of an ancient ferry. The court (of Exchequer) refused the injunction, because the privilege claimed came too near a monopoly and restrained trade, and *no precedent shown.* The reporter adds a "query, for contrary to 22 H. 6, and to precedents in like cases in this court." It is said in 2 Anstruther, 608, that on a new bill in 1660 before *Hale* B. the new ferry was suppressed. It is somewhat strange, if this authority had been overruled, *Hardres* should not have known of it, when the supposed reversal took place only a year after the decision, and that *Hale* should not have mentioned it, in his note to *Fitzherbert.* It is observable however, that the case is distinct in principle from the rule we are now considering, as the defendant did not claim under a license, but under a common law right.

In the case of the lessees of the dean and chapter of Durham, 1 Ves. sen. 476, who applied for an injunction to restrain certain watermen from using ferry-boats on the Tyne, Lord *Hardwicke* did not appear to be willing to admit the exclusive claim, nor did he advert to the necessity of an *ad quod damnum* to justify the defendants. He denied the application, upon the insufficiency of the affidavits to prove that boats enough were kept to answer the wants of the population of Newcastle, and he observed, " this is like a ferry on the Thames and passage boats to Gravesend, which have a sole right of carrying, yet other wherries do carry every day, and it is not held an infringement of that right."

The decisions in regard to fairs and markets, affirm the principle, that with a license a second ferry may be set up. Unless the new market is set up within seven miles of the old one, it is not a nuisance ; and this without any *ad quod damnum*. Bract. 238 ; Fitzh. N. B. 184, note *a*. In *Yard* v. *Ford*, 2 Saund. 175, which was an action on the case for setting up a market *without any lawful warrant or authority*, to the nuisance of an ancient market, *Twysden* J. said that the plaintiff was entitled to judgment, as the defendant was an apparent wrong-doer, but " that if the defendant *had a patent* to levy his market, perhaps it might be more doubtful."

It is not denied that the identical franchise cannot be bestowed by the crown on a second grantee ; but that a grant of a similar franchise or thing may be made upon an *ad quod damnum*, duly returned, is very clear. In *Rex* v. *Sir Oliver Butler*, 3 Lev. 220, a grant had been made upon a writ of *ad quod damnum* to Butler, to have a market at Chatham ; and on a *sci. fac.* to repeal this grant, it was alleged that the city of Rochester had a prior grant of a market within a mile and a half of Chatham, and that the *ad quod damnum* had been executed surreptitiously. The second patent was held void, but *Levinz* adds, that " the defendant sued another writ of *ad quod damnum* and took a new patent, which was granted because a market at Chatham was very convenient, if not (absolutely) necessary in respect of navigation, and the shipping and stores, and the labourers about the shipping there."

Thus it appears, that the question whether the privilege claimed is or is not a direct interference with an elder one, is left to the traverse on the *ad quod damnum*. And no doubt it is practically decided by public convenience, as an inquiry of this kind necessarily must be. If the public convenience counterbalances the remote or consequential loss to the individual, then the return would unquestionably be in favour of a new grant or license. Hale *De Portibus Maris*, (Hargr. Tr.) 59, 60.

There is an analogy between the exercise or control of these public rights, and the discontinuance of ways, and of passages in navigable waters, which is another branch of prerogative power entrusted to the executive authority for the public good. These rights, as they affect the public, may not only be changed by act of parliament, but by writ of *ad quod damnum*, and, perhaps, by commissioners of sewers, if they found it would be for the advantage of the whole land. *Rex* v. *Montague*, 4 Barnw. & Cresw. 603; Fitzh. N. B. 226.

Further, if the owner of a market does not provide sufficient accommodation for the public, he cannot maintain any action for an interference with his right, against those who undertake to supply his deficiency. *Prince* v. *Lewis*, 5 Barnw. & Cresw. 363.

Now in the amended bill the plaintiffs admit, for the purposes of this hearing, that public necessity or convenience did require another bridge. If they had an exclusive right, they ought to have supplied the want. Not having done so, the legislature might authorize any one to perform this public duty. In *Mosley* v. *Walker*, 7 Barnw. & Cresw. 52, cited on the other side, Lord *Tenterden* says, "We are not called upon, on the present occasion, to lay down as a general rule and principle of law, that the grant of a market for the sale of certain things necessarily carries with it an exclusion of the right of sale of similar commodities in a private house, whether the market is convenient or not." The consideration failing on which the grant was made, that is, the public convenience, no previous inquiry in order to put an end to it seems to be necessary. When the deficiency is proved, it is a sufficient answer to the claim.

From the authorities now examined it may be deduced as

the law of England ;—1. That a ferry is an incorporeal hereditament and a local franchise, having respect only to the landing places :—2. That a person *without a license*, interfering with an ancient ferry, is considered a wrong-doer, and liable in a suit for damages :—3. That upon an *ad quod damnum* a new ferry may be licensed. Beyond this, that law is silent.

In this commonwealth no provision has ever been made for issuing a writ of *ad quod damnum*. The power of establishing, altering and discontinuing roads and ferries, has been from time to time delegated to subordinate tribunals. The subject appears to have been entrusted to their discretion. In no instance has a license granted by them been deemed exclusive.

When navigable waters were to be permanently obstructed, resort has been had to the supreme power of the state, the legislature. The control of this portion of the eminent domain was reserved by the legislature; and the history of our legislative proceedings may be appealed to with safety for the support of this position. The petition to the legislature stating the public wants, is followed by an order of notice; sometimes a viewing committee is appointed; then a committee of both houses to give the parties a hearing; which terminates in a report as the basis for the conduct of the legislature. The proceedings from time to time in relation to the bridge of the plaintiffs, and the subsequent ones connected with Boston, are according to the course pursued both before and since the revolution.

From the adoption of the state constitution in 1780 to 1811, among the various statutes passed authorizing bridges to be built over navigable waters, there are but four instances in which the subject of compensation is brought into notice; *viz.* Essex bridge in 1787, Essex Merrimack bridge in 1792, Haverhill bridge in 1793, and Andover bridge in 1794. During this period there were fourteen instances where bridges were authorized to be built at or near ferries, as mentioned in the acts, and no compensation was provided; besides a multitude of cases where probably ferries were in use, the existence of which is not noticed.

That a grant of a ferry does not *ex vi termini* import any exclusive right, except at the particular landing places, is not only

shown by the uniform course of legislation upon this subject, and in relation to this particular ferry itself, but it follows from the nature of our country and the circumstances under which it was settled. If the doctrine contended for by the plaintiffs had been adopted, the first grant of a ferry on the Merrimack at Newbury, or on the Connecticut at Springfield, would have carried the right to the river in its whole extent; for no other ferry, at that early period, could have been set up, which would not have drawn away the custom from the one already established. This doctrine of exclusive privilege was not then entertained. It has since been engrafted by cupidity upon possession. The first settlers came with a fixed hostility to exclusive privileges of all kinds, and as early as 1641 they declared, that "there shall be no monopolies granted or allowed amongst us, but of such new inventions that are profitable to the country, and that for a short time." Anc. Charters, &c. 170.

4. Whatever may have been the rights of the college in the ferry, the college did not grant or convey the same to the plaintiffs for the term of forty years, mentioned in the act of 1784.

No grant is produced and no lost grant is supposed. There is no chasm in the college records. No vote is exhibited authorizing the transfer or showing that any one had been made. The proceedings of the legislature furnish no evidence that such grant was made, or that the rights of the college were surrendered by the college, and then granted by the government to the plaintiffs. If the franchise was surrendered, it was extinguished; and if it exists, it must have been re-created by express enactment. Finch's Law, 164, *c.* 14. There is no room to presume a grant from the college; the operative instrument of transfer must be the act of incorporation. The plaintiffs allege that the payment and receipt of the annuity, and ceasing to keep the ferry, furnish ground for presuming, not a grant, but the agreement of the college to the act of the legislature. Their silence or acquiescence proves nothing. If A suffers B to convey his property to C without making known his title, it amounts at most only to an estoppel. But here C knew of A's title. Certainly no grant of A's rights is to be inferred in such a case. Besides, no consideration is given to the college for the sup-

posed grant. They were already in the receipt of the 200*l.* a year. The conclusion to be drawn from the acquiescence of the college, and from the omission of the petitioners for the bridge to treat with them for their supposed rights, is, that neither party believed any such rights to exist. The right to dispose of and manage these navigable waters was considered to be in the commonwealth alone, and hence, instead of providing in the act of 1784, that the college, at the end of forty years, should be put in possession of the bridge, which is stated to be a substitute for the ferry, it is to *revert* to the commonwealth.

The ferry was an hereditament, and lay in grant, and not in livery; and by our *St.* 1783, *c.* 37, § 4, could pass only by deed duly acknowledged and recorded.

5. But if the plaintiffs had the right of the college for forty years, they ceased to have it on the termination of that period.

The college received no consideration for the extension of the term. The annuity was not increased, notwithstanding the increase of population and travel. The assent of the college was not asked nor given.

6. Whatever right the college might have to a ferry, they could convey no right to the plaintiffs as a corporation to build a bridge. *Payne* v. *Partridge*, 1 Show. 243, 257; *S. C.* 1 Salk. 12; *S. C.* 3 Mod. 293.

7. No such exclusive right as is claimed by the plaintiffs was conveyed by the legislature, by the act of incorporation for the term of forty years.

That the act of incorporation is a contract, we do not deny; and if the recent act violates that contract, and so is repugnant to the constitution of the United States, we concede that it is in the power of the Court to declare the recent act to be void. But so much respect is due to any legislative act solemnly passed, that the Court will presume it to be constitutional, until the contrary clearly appears. *Hilton* v. *United States*, 3 Dallas, 175; *Calder* v. *Bull*, ibid. 395, 399; *Cooper* v. *Telfair*, 4 Dallas, 18; *Fletcher* v. *Peck*, 6 Cranch, 128; *Adams* v. *Howe*, 14 Mass. R. 345.

We contend that the contract entered into in 1785, was, that the proprietors of the bridge should be a corporation for the

term of forty years, and that they should have authority to take toll, for their sole benefit, of all persons who should pass over the bridge during that period. This is the whole of the *exclusive* right.

An exclusive grant to the extent claimed, would have been a violation of the constitution of the commonwealth. Exclusive privileges can be granted only for "the consideration of services rendered to the public." Bill of Rights, *art.* 6. In the choice of modes to prevent any abuse of the power of rewarding such services, the only safe and practicable one which occurred to the makers of the constitution, was, to require that the services should be rendered *before* they should be rewarded; in which case the nature and value of them could be ascertained.

A grant made by the public is not to be extended by implication. A grant made by the king *at the suit of the grantee*, shall be taken most beneficially for the king and against the party. It shall not enure to any other intent than that which is precisely expressed. 2 Bl. Com. 347; *Royal Fishery of the Banne*, Davies, 157; Finch's Law, 100; *Legat's Case*, 10 Co. 112; *The Elsebe*, 5 Rob. Adm. Rep. 162; *The King* v. *Capper*, 5 Price, 217; *Portland Bank* v. *Apthorp*, 12 Mass. R. 252.

8. Still more strongly, if possible, is all idea of such an exclusive right negatived by the language of the extension of the charter in 1792. The plaintiffs at that time set up a claim to this exclusive right by purchase from the college. The committee of the legislature, in their report on the plaintiffs' remonstrance, deny the existence of the exclusive right claimed to build over the waters of Charles river, and the act itself of 1791 is silent as to any such right.

Fletcher on the same side. This case, however important it may be in a pecuniary point of view, to the parties themselves, is of much greater importance in reference to a free course of legislation. The general welfare is closely connected with it. The present age is remarkable for the progress of improvements; which is the natural result of a liberal competition.

The plaintiffs seek to annul a law opening another avenue to the large and increasing metropolis of Massachusetts. This law was not enacted through inadvertence. The object of it had been several years under the consideration of the legislature, and the plaintiffs had again and again urged their objections; which were deemed invalid.

The defendants have been charged with a disposition to invade private property. They maintain as strongly as any one, that property is to be protected, and that contracts should be held inviolable. They have no greater interest in the present case than the rest of the community. Nor have they acted without a due regard to the rights of the plaintiffs. It is not to be concealed, that this claim on the part of the plaintiffs is not new. In the cases of the West Boston bridge and the Canal bridge, this same question of exclusive right under the college and under the plaintiffs' charter, was presented to the consideration of the legislature, and was disallowed. Some of the most distinguished lawyers in the commonwealth were active in obtaining the grants for those bridges, and the plaintiffs have acquiesced for more than thirty years in the supposed violation of their rights.

The claim now made will not bear examination. It cannot be stated, in any form, so as not to be bad on a demurrer at common law.

The plaintiffs allege that they were authorized to build a bridge *at* or *near* the place where an ancient ferry was kept; but the expression in their charter is *in the place*. They allege that their bridge was designed to accommodate a certain *line of travel* leading to and from the southerly part of Charlestown and the northerly part of Boston. If this means any thing, it means a line of travel from Charlestown square to the north end of Boston; and with that the defendants do not interfere. But in truth, Charles river bridge was intended to accommodate the whole country. Travel came from the east, north and west, from other states as well as from different parts of our own; and the idea of a *line of travel* taking in all this is preposterous. West Boston bridge was upon this line of travel, if it can be so called, as much as Warren bridge.

They do not allege that by their act of incorporation they had an exclusive right over these waters. But they set out that there was an ancient ferry owned by the college, and that when their act was passed, the college consented to accept of them 200*l. per annum*, in satisfaction and as a compensation for the exclusive right to the whole ferry, and thus they became successors and assignees of the college for forty years, and so were entitled to erect a bridge : a palpable *non sequitur*.

The original charter to the proprietors of Charles river bridge has expired, and if the act of 1791 has not been accepted and the conditions been performed by them, they have no longer any right.

We allege that they had an agency in procuring the extension of their charter; but this they deny. It is certain they did not apply for a charter to the proprietors of West Boston bridge, but remonstrated, and represented that the profits received had not amounted to eleven per cent. upon the original cost. If their bridge was so unpromising and they did not interfere in the extending of their charter, there can be no presumption of their accepting the extension. As it was a grant imposing liabilities and increasing burdens, there ought to be proof of an express acceptance. They produce no vote to that effect of an earlier date than 1802. They kept a bridge indeed, but it was by virtue of the original charter; and nothing was done by them by which they would be bound, previous to 1802. A vote of acceptance in that year would have been too late, but they produce no such vote. Merely entering the act on their records neither implies acceptance nor non-acceptance. It would not have estopped them from denying any acceptance; and so they understood it, since in 1826 they passed a vote expressly accepting the extension. This was too late. The legislature ought to have been informed of the acceptance, as it might affect their proceedings in respect to other bridges. We had applied for a new bridge in 1823. [Parker C. J. Is it not an answer to this, that in the act incorporating the proprietors of the Warren bridge (§ 8) the legislature recognise the charter of the plaintiffs as being in force?] The question of acceptance was not before the legislature, and we think that that recognition is not an estoppel.

The relinquishment of the double toll was a condition, a compliance with which was indispensable to the extension of the plaintiffs' charter. The proof is, that they did not give it up immediately after the passage of the act of 1791. The relinquishment ought to be by some express corporate act; not merely by ceasing to take the toll. For suppose that West Boston bridge had not been built within the three years allowed; the complainants would then have resumed taking the double toll, and they could not have been prevented. And most of the witnesses say that the ceasing to take the double toll was after the West Boston bridge was built.

The plaintiffs allege that the recent act is contrary to the constitution of this state, because it takes away their property without providing for compensation. We admit that the legislature cannot take private property for the use of the public, without making compensation. Neither do we deny that a ferry-right is property. We contend however, that it is *real* property. It is a local franchise; of which the owner may be disseised. And for the recovery of it, he might have an assise of novel disseisin, (*St. Westm.* 2, *c.* 25,) a *præcipe quod reddat*, and an *habere facias*. These remedies are applicable only to real property. And if we have taken their real estate, they have a remedy given expressly in our act of incorporation. We have no authority to take personal property, and if we have done so, we are liable to an action.

We contend that we have not taken any real property belonging to the plaintiffs. The nature of their estate is apparent. They have their bridge. Higher up the river the public have the right. The complaint is founded on the circumstance, that the public have used their property above the bridge, whereby the plaintiffs have sustained damage. If the public have restrained themselves from so using their own property, doubtless we have no right to maintain our bridge; but still we say that we have taken no property from the plaintiffs. The case is precisely like that of *Callender* v. *Marsh*, 1 Pick. 418. Though the plaintiffs may suffer, the loss is occasioned by a legitimate exercise of the power of the public over their own property, and is *damnum absque injuriâ*. It is a collision of inter-

est, not of right; and the interest of the few must yield to that of the many. The proprietors of Charles river bridge ought to be the last persons to complain of hardship. They say they built their bridge for the public benefit, and all they asked was to be reimbursed. Their charter gave them a toll for that purpose, and their receipts have been equal to many times the amount of their disbursements.

The next question is, whether the act of 1826 is in violation of the constitution of the United States, as being an act impairing the obligation of a contract.

The act is within the general scope of legislative authority, the object of it being to make a highway over an arm of the sea. It is not a wanton exercise of power, but was intended to meet the demands of the public. The question of convenience and necessity is to be determined by the legislature, and is not to be rejudged elsewhere. The act itself need not purport to be founded on public convenience and necessity; that is implied in the mere enactment.

But the plaintiffs say, that although public convenience and necessity might require another bridge, still our act was not required; that they offered to make another bridge, or to sell their franchise, or to reduce their tolls. If they could under their charter build another bridge, or make a spur-bridge, why did they not do so? Their conduct shows that they had little faith in the ground they assume, of a right to the whole of the river between Boston and Charlestown. They claim now, that no rival bridge shall be erected between Boston and Charlestown. Formerly they claimed a right over the waters as high up as West Boston bridge. If they go upon principle, they must exclude *all* injurious competition, and they were right in opposing the construction of that bridge. But they say, that whether a competition shall be lawful or not, depends on the degree. There can be no degree in principle. They must either say that the legislature can authorize no competition at all, or that they may allow as much competition as they please. A very large amount of toll was drawn off by West Boston bridge and Canal bridge, in which the plaintiffs acquiesced; and it is absurd to say that the amount makes any difference. The question is entirely within the discretion of the legislature.

The legislature are only bound not to re-assert any right which they have before granted; and the question is, whether the same right has been granted to Warren bridge that had been previously granted to Charles river bridge. The plaintiffs say that the whole right of transportation between Boston and Charlestown had been granted to the college, and so the grant of a part of it to the Warren bridge is an infringement on the first grant.

It is necessary then to consider what was the right as between the government and the college. This is matter of record; all prescriptive right is excluded. Until the year 1650 the college had not interfered in the management of the ferry, but had only received the income. It was then provided by the government, that when the lease should expire, the college might dispose of the ferry by lease or otherwise, but on condition that it should be under the regulation and control of the government. In 1654 there was a grant of 100*l.* and, as we say, of the revenue of the ferry, to continue during the pleasure of the country. In 1655 the government lent the president of the college for his personal expenses, the sum of 30*l.*, to be repaid out of the income of the ferry. In 1694 and 1710, acts were passed, regulating the ferry. In 1780 the college made repairs on certain sheds connected with the ferry, and directed the expenses to be laid before the legislature. And lastly, in 1781, the entire control of the ferry was taken into the hands of government. Our construction of these and the other proceedings relating to the ferry is, that no grant of the ferry itself was made to the college, but that they were permitted to receive the income, as a gratuity. It was suggested that there was no distinction between a grant of the income and of the thing itself; but it may be said as well, that the grant of the annuity makes the college the owner or a part owner of the bridge. The words of the grant of 1640 might carry the ferry, but the acts of the government and of the college, before and after the grant, give to it a different construction. The college was not then a corporation; and no burden was imposed on them of managing and looking after the ferry; but to let them receive the income, was consistent with the intention of the government and the situation of the college. The only object was, to give the college

some revenue. The government was the patron; they were the beneficiaries. On the application of the college stating that they could manage the ferry to more advantage than the government, they were in 1650 allowed to dispose of it on certain conditions. The college could not have been indicted for not keeping boats and maintaining the ferry. They might have declined doing so when they pleased, and the government might have resumed the ferry at pleasure. The course of interference on the part of the government rebuts the idea of a grant; and the interference was commensurate with the public exigencies, until the moment when the ferry was superseded by the bridge. It is idle to talk of the consent of the college to the act of 1784, which takes away the whole franchise. It is a mere fiction. They were not a party to the act, and had no voice in the matter. A provision is indeed made for their benefit, but they made no application for it. In 1800, it is true, they recite their consent, but it was with a view of gaining something. Whatever they had received, had been bestowed as a bounty.

Whenever the ferry was spoken of, it was understood as perfectly defined; it was from one landing-place to the other. In Savil, it is said, the ferry is in respect of the landing-places. The plaintiffs contend, that the exclusive right of transportation between Boston and Charlestown, to the end of time, and without any reference to increase of population, was given to the college. Such a position is not creditable to the intelligence of our ancestors. They came to this country with a hatred of monopolies, and they ordered, not that no monopoly should be *granted*, but that none should be *allowed*. They foresaw the augmentation of population and the increasing wants of the country. There were several ferries already from Boston, and if in this case they threw away public rights in the manner supposed, it is a solitary instance. They knew the difference between an indefeasible grant and one revocable at pleasure, and between a grant which was exclusive and one which was otherwise. (See the order in 1648 respecting the Neponset ferry.)

And this exclusive, interminable right of the college, is sold for an annuity of only 200*l*. per annum! The plaintiffs set

out that they are the assignees of the college, and owners of this exclusive right. One would naturally expect to see some parchments and formality in a negotiation of such magnitude; but the whole turns out to be a fiction. No deed or vote of the college is pretended; there has been no loss of any instrument; but still the plaintiffs say they are grantees, because the college ceased to keep up the ferry and received the annuity. If the college did own this ferry exclusively and absolutely, the destruction of it was a high-handed interference on the part of the government. But it is said a compensation was made. A sum fixed by the legislature was given, but that was not a constitutional compensation. *Vanhorne* v. *Dorrance*, 2 Dallas, 315. The college had a right to a trial by jury. Their acquiescence does not change the nature of the act. The plaintiffs say, that by reason of the payment of the annuity, they became purchasers of the ferry, whether the college consented or not, and so they were equitable assignees. [*Webster*. We say the evidence shows a consent.] The college ceased to keep up a ferry and received the annuity, but these acts do not show that the college were a party to the act of 1784. The proceedings of the legislature were on the ground, that the college had no control of the ferry. The college would not wish to quarrel with the government, which had been their benefactor, but it is extraordinary that they should have been willing to yield all their rights to the plaintiffs. The plaintiffs did not pay the annuity; it came out of the public, out of the tolls. The government did not intend that the annuity should be considered as a compensation to the college, and according to the authorities on the other side, it could not be so; it was a gratuity from the government. There was no increase of the amount which the college had been accustomed to receive, and yet the bridge, at the end of forty years, was to revert, not to the college, but to the government, saving to the college a reasonable compensation for the income of the ferry. This repels any title in the college, independent of the pleasure of the government.

The plaintiffs say that the bridge is a substitute for the ferry; that they are the successors and grantees of the college, and that they stand in the same situation, as owners of the ferry. If

so, they are subject to the same regulations; which they will hardly admit. But they say the legislature are restricted by their grant. If so, then the grant of the ferry is one thing and of the bridge another; which disproves their position. The legislature regulated the ferry, but if it should undertake to regulate the toll-men, the plaintiffs would deny its authority: and justly; but they would rely, not on the assignment of the ferry, but on their own charter.

The case is stripped of the ferry-rights, and the question must be, whether, by the acts of 1784 and 1791, a contract was made restraining the legislature from granting our bridge. Is the act of 1784 impaired by that of 1827, or is the thing granted re-asserted?

We might rely on the plaintiffs' own view of the case. They have not relied on an exclusive right as derived from their charter, but they try to connect their charter with the college right. They cite a case from Palmer, to show that a bridge may be substituted for a ferry; but in *Pain* v. *Patrick*, 3 Mod. 294, it is held, that the owner of a ferry cannot convey a right to build a bridge.

Their charter allows them to erect a bridge at a particular place, where the ferry then was. The landing-places were well known. If their grant were construed most against the grantors, it would not give a right to take toll at any other place. They will not contend that they can erect a bridge off of the precise spot where the old ferry was kept. The fallacy is, they do not consider themselves as the grantees of a bridge with the right to take toll of persons going over it, but they say they have a right to take toll of all persons passing between Charlestown square and Boston; and they liken their rights to those of a mill, to which all persons belonging to the manor must carry their grain; they say they have a right to make people pass over their bridge, and not merely to take toll of those who do pass. That their charter will not bear this construction, is manifest from the authorities cited. 2 Bl. Com. 347; *The Elsebe*, 5 Rob. Adm. Rep. 162. There is not a word in their grant, showing it to be exclusive. Every man takes such a grant subject to the right of the legislature to make a similar one

whenever public convenience and necessity shall require it. But it is asked, would any person take such a charter for a bridge, if the legislature may immediately erect another bridge by the side of the first? On the other hand, we may ask, whether the legislature would make such a grant as the plaintiffs contend for. But we may say further, that such a charter would be accepted; for the citizens have confidence in the wisdom and integrity of the legislature; they are willing to believe that the legislature will act as the public good shall demand, and will not injure an individual by a wanton exercise of power. There was no necessity for making so extensive a grant as the plaintiffs claim; the Cabots were offering to build a bridge from Boston to Lechmere Point on much better terms; and the reason why their petition was not granted, was the sympathy felt for the inhabitants of Charlestown on account of their sufferings during the war.

The cases cited on the other side may be arranged in three classes. First, where the grant of the legislature is repealed or altered without the consent of the grantee, as in *Fletcher* v. *Peck* and *Dartmouth College* v. *Woodward*. Those are in no degree parallel to the present case. The plaintiffs say, that taking away their toll is equivalent to taking away their grant. But our act does not prevent their receiving toll. Making a similar grant is not granting the same thing. Another class relates to exclusive grants; and to such the remarks of Chancellor *Kent* apply, in *Gibbons* v. *Ogden*. A third class is where the public have made a grant of a highway, and an individual, without any authority from the government, sets up another and diverts the custom, leaving the grantee obliged to maintain his highway, while he is deprived of the benefit allowed him by the government.

Reliance has been placed on a dictum in the Year Book of 22 H. 6, that a ferry set up near an old one is a nuisance. This was said *arguendo*, and though it has been repeated in books since, it is not sustained by the authorities, in the sense in which the plaintiffs would have it understood. It referred to an interference by an individual acting without authority from the government. Willes, 512; *Yard* v. *Ford*, 2 Saund. 174; 1 Nott and M'Cord, 395; 3 Murphy's N. Car. Rep. 57. The

case of *Rex* v. *Butler*, 3 Lev. 222, is conclusive on this point. The whole reasoning there proceeds on the ground, that the writ of *ad quod damnum* was *surreptitiously* obtained, and so the new market was a nuisance. It has been suggested, that an *ad quod damnum* is a matter of form; that it is executed without notice. This is a mistake. The English newspapers of the present day contain advertisements in which the sheriff gives notice that he is about to execute such a writ. Upon a license granted after a writ of *ad quod damnum* duly executed, a man sets up a market &c. with safety. *Rex* v. *Montague*, 4 B. & Cr. 598.

We have no writ of *ad quod damnum* in our practice; but a hearing before the legislature is equivalent. The report of the committee of the legislature in 1792, negatived any exclusive right in the plaintiffs, but as a matter of bounty they recommended an extension of the time allowed them for receiving toll for passing their bridge, and whatever may have been the original grant, it should seem that this report was intended to put an end to the claim of an exclusive right, and the plaintiffs must take the extension in the terms in which it was given. There has been a contemporary and repeated construction of the plaintiffs' right, and in which they have acquiesced. Their claim was made before the legislature when the West Boston and the Canal bridges were granted, each of which interfered greatly with their profits. The spur from the Canal bridge, it is said, leads from Charlestown to Cambridge; but it likewise leads from Charlestown to Boston. An acquiescence in wrong may not give a right; but we allude to the fact as showing the general understanding of the community.

There is nothing in the English decisions that is inconsistent with the practice of our legislature; and if there was, they could not control the practice and principles which have been held here from the settlement of the country. The usage here has always been, to make grants like the one in question, without giving any exclusive right. The case of Chadwick's ferry settles no point of law. The legislature made provision for his indemnity, but otherwise it was not a question of right. In some instances the legislature give a privilege of taking shares

in the new enterprise, in others a fixed sum is allowed ; not as a matter of right, but of discretion. If the doctrine on the other side is correct, the grants of most of the bridges about Boston were outrages upon private property ; in particular, the free bridge to South Boston. The turnpike from West Boston bridge to Watertown, was of the same character. The declared design of it was to draw travel from the turnpike leading from the Mill-Dam to Watertown. Why has there been no prosecution before, unless from the general understanding that the legislature had a right to make these grants ?

The plaintiffs argue, that a decision in our favour will put a stop to enterprise. On the contrary, that is the very genius of monopoly. History shows, that monopolies in England became intolerable, and they were swept away by the statute of James. If the system had been practised on here, we should now have had the old ferry, instead of the plaintiffs' bridge. A new invention always injures a previous one ; but improvements have gone steadily on in this country, and we trust will continue to make advances under our system of liberal competition.

Webster in reply. The question before the Court is now to be discussed and settled upon strict principle applicable to private rights. The case is now where reason is to govern, and not declamation. Legislatures do not act under the same responsibility as judges. They may determine by simple ayes and noes ; but a judge must give reasons for his decision. It may not be improper to advert to general considerations of expediency, but they cannot have very great influence. The defendants talk of a free course of legislation, of free competition, as the source of public improvements. They would not, I trust, compete with us for our franchise. But how are public improvements promoted among us, except by private funds advanced upon a confidence reposed in the most delicate and strict observance of public faith ? Nothing is done here by the government itself, but every thing by individuals, under the sanction of the government ; and the defendants would bring their liberal doctrines into conflict with rights thus established. I rejoice in an opportunity to resist the attempt to force these popular notions upon courts of justice.

The plaintiffs have a bridge, at which they receive toll; the defendants place another bridge by the side of it and take two thirds of the toll; and the question is, whether this is an invasion of private rights. If the new bridge is not protected by the act of 1827, we say it is a nuisance at common law; if it is so protected, then we say that that act is contrary to the constitutions of this state and of the United States.

Before considering these great questions, it may be well to dispose of some subordinate collateral matters.

The plaintiffs must be an existing corporation in order to maintain this suit. The defendants say, that the original charter of the plaintiffs has expired, and that there has been no acceptance of the extension allowed by the act of 1791. The objection admits of several answers. First, if the plaintiffs are not a corporation, it should have been pleaded in abatement. Secondly, the defendants' own charter recognises the plaintiffs as a corporation. And thirdly, the plaintiffs *have* accepted the extension of their charter. If an act of incorporation is granted to individuals, organizing themselves under it is an acceptance of it; and if an additional act is passed, any thing done in conformity to it, which they could not have done without it, is an acceptance of the additional act. The plaintiffs have continued to act as a corporation; which is conclusive evidence of such acceptance. But it is said we ought to have accepted sooner. What then? It may be matter to be tried on a *quo warranto*, if the commonwealth see fit to institute such process; but it does not concern the defendants. Before the expiration of the first act, the second was expressly accepted by a vote; and why was not this in season? Further, the plaintiffs acted in a manner irreconcilable with the non-acceptance of the act, by discontinuing to take the double toll. It is objected however, that this was not until the West Boston bridge had been built. Witnesses in speaking of a transaction which took place more than thirty years ago, would naturally refer to something visible to fix the time; but we believe that the plaintiffs discontinued the double toll immediately after the passing of the act, though they did not make the entry of the act on their books till 1802. Besides, the provision on this subject was not a condition precedent. Grants which

are beneficial to a corporation, are presumed to be accepted. *United States Bank* v. *Dandridge*, 12 Wheat. 70. The act in question, so far as the plaintiffs' assent to it could be of any avail, was beneficial to them. If they had had the power, they would have rejected the whole act; but that they could not do, and the extension of their charter for thirty years was a benefit.

The defendants say, that the ferry was not a ferry by prescription. We have merely called it an ancient ferry. But whether it was by prescription or by grant, the law in regard to it is the same.

It is objected that the college have never assented to the act of 1791. They have received the annuity provided for by the act, and this is an assent. But their assent was not necessary. Their whole right to the ferry had been relinquished in 1785, and the question in 1792 was between the government and the plaintiffs only.

Other cases of questionable legislation have been enumerated on the part of the defendants. It is a very usual course for a man in fault, to resort to similar instances for his justification. There is a natural alliance between bad principle and bad practice. But the Court are not told of the ninety-nine cases in the hundred, in which the legislature have been sedulously attentive to the preservation of private rights.

First, it is said that if our construction of our charter is correct, the grant of West Boston bridge was a flagrant violation of our rights. Suppose it was so; we complain now of a more flagrant violation. Is a former remote encroachment to justify an immediate and direct encroachment? Forbearance in a questionable case does not affect the right. If the legislature did wrong in granting the West Boston bridge, they at the same time conferred a benefit in the extension of our charter, which furnished a sufficient reason for our acquiescence.

The counsel say, that in 1792, a committee of the legislature made a report, which was accepted, giving the negative to our claim to an exclusive right. The report is of no authority,—but what does it amount to? That the act of 1784 "is not an exclusive grant of the right to build over the waters of Charles river." If the plaintiffs misconceived their rights, it does not

follow that they have no rights. We do not now set up the claim which was made in 1792 ; our present claim and the report may well stand together.

The erection of Canal bridge too, it is said, was, according to our principles, a violation of our rights, and yet we did not resist. Possibly the proprietors of Charles river bridge thought the interference was rather with West Boston bridge ; and the division between that bridge and Canal bridge, of the burden of the college annuity, favours the idea. It is however sufficient to remark, that if in a doubtful case the plaintiffs did not think it would be advantageous for them to contend, it does not conclude them in the present case.

In regard to Malden bridge, the Penny ferry seems to have belonged to the town of Charlestown, and the inhabitants may have considered that their interest would be advanced by having it superseded by the bridge. And when this bridge was afterward injured by the grant of Chelsea bridge, it was provided in the act, upon the agreement of the parties, that a portion of the profits of Chelsea bridge should be paid to the proprietors of Malden bridge. But it is objected that no compensation was made to the owner of Winnesimet ferry for the damage occasioned by Chelsea bridge. It may be remarked in answer, that the bridge was between Chelsea and Charlestown, and the ferry was over an arm of the sea from Chelsea to a third town at a considerable distance from the bridge.

In the case of the free bridge to South Boston there was no memorial in behalf of the proprietors of the old South Boston bridge, and a majority in interest were in favour of the erection of the new bridge.

The two turnpike roads from Watertown to the Mill-dam and West Boston bridge, were both granted in the same year, and it was a race between the parties, which should get a road first.

But none of these instances furnish authority for a court of law.

Much has been said about odious monopolies. Is a bridge, a ferry, a fair, or a market, a monopoly ? The statute of James has not swept *them* away. A monopoly is a grant of a benefit

without any burden. *Viner* says, that a ferry or a bridge is not a monopoly, because there is a duty to be performed by the proprietor. Doubtless our predecessors, the Indians, had the perfect freedom of competition which the defendants now want to introduce; but they had no bridges, no ferries. All the public improvements in the country have arisen from what the defendants call monopoly; from a grant by the public, of security for private funds, for the benefit of using them. We are asked if our ancestors would have granted to the college a right over the whole river. Undoubtedly they would; and if they had foreseen the increase of population in the vicinity, with their anxious desire to encourage learning, they would have done it the more willingly.

We come now to the consideration of the real questions in the case.

The first question is, whether the college had any ferry-right in 1785;—whether by one or all of the previous grants, or by usage only is immaterial.

A ferry having been previously established between Boston and Charlestown, in 1640 the general court say, "the ferry between Boston and Charlestown is granted to the college." These words would be sufficient now to pass a ferry; and at that period, it was not usual to be more full and formal in making grants. A ferry will pass by any words which show such an intent. 1 Nott & M'Cord, 393. The defendants say that this was a gratuity to the college. It may have been a gratuity, but it was not revocable. A gift executed is beyond the power of the legislature. This grant has been recognised by the government in 1650, 1654, 1710, 1712, 1781, and 1785. The act of 1781 (*St.* 1780, *c.* 42,) regulating the ferry, imposes a heavy penalty on the college in case of negligence; and yet the defendants say the college were subject to no burden. The statute proceeds upon the ground, that the college were liable to indictment, if the ferry were not properly kept. The power of even regulating the tolls is recognised by that statute to be in the college; and yet it is said they had no franchise. In *St.* 1784, *c.* 53, § 5, "a reasonable and annual *compensation* for the annual income of the ferry" is saved to the

college, after the bridge shall become the property of the commonwealth. Is this a gratuity, or is it an express acknowledgement of a pre-existing right, and a compensation for the relinquishment of that right? All these acts are confirmations of the grant, and yet it is argued, that they prove that the college had no right at all. As well may it be contended, that the several ratifications of *magna charta* abrogated it.

It has been objected, that the college could not take under the grant, not being a corporation until 1650. That may have been the reason then why a confirmation was made.

It is urged that the government have constantly interfered in regard to the ferry. But they took none of the revenue, nor ever resumed the franchise; all their acts were merely regulation.

The defendants distinguished between a grant of the *franchise* and of the *profits* and *revenues*. But the distinction does not aid them. All that the government could grant to an individual was the benefit. There is nothing beneficial in a ferry except the tolls, the revenue; and a grant of the revenue carries with it an obligation to support the ferry. The government did not sustain this ferry; they built no boats, they merely regulated them; they derived no profit from the tolls. The actual management and revenue have always been with the college. If using the whole franchise for a hundred and forty years, does not give a title, it will be difficult to know who in this country has a title.

Next, what is the extent of the ferry or franchise, up and down the river? It is sufficient for us to show that it is broad enough to cover the place where the defendants have built their bridge, and that so the bridge would have been a nuisance to the ferry.

The grant was of a ferry between Boston and Charlestown; and this in legal contemplation takes the whole of the two termini. It covers the whole water between these two towns. Suppose that no ferry or bridge had subsisted between these towns, and an individual should to-day purchase of the government "the ferry between Boston and Charlestown;" how would the grant be interpreted? It must either include the whole wa-

ter between Boston and Charlestown, or it has no limits. Would the Court hold that the same prerogative could to-morrow grant another ferry by the side of it? The case is analogous to that of a market. If a market is set up too near an ancient market on the *same day*, it is by intendment of law a nuisance, but if on another day, whether nuisance or not is a question of evidence. So a ferry established between the *same termini*, is by intendment of law a nuisance.

It is clear law, that it is a nuisance to set up a ferry so near another as to draw away the toll. This doctrine, the defendants say, is traced to a single dictum in the Year Books. That would only prove that it was too plain to admit of dispute. But it rests on other authority. The case in Hardres, as reversed by Hale, acknowledges the law as above stated; and it is recognised by Brooke, Rolle, Comyn, Blackstone, Kent, and the court in South Carolina.

Where a thing is granted, all that is necessary to the enjoyment of it goes with it. If an office is granted by name, all the powers, duties and fees belonging to it pass. So of a ferry. If an individual grants a ferry, all his rights accompany it; and it is settled, that the right of a ferry, in local extent, is exclusive, so far as to put down injurious competition. How does the grant to the college in 1640 carry the beneficial part, the tolls? They are not mentioned in the grant; but it has not been pretended that the college took only the privilege to row and scull. The law says, that the right to toll goes with the ferry by implication; but it says so no more than it does, that in like manner passes the right to put down injurious competition. Both are equally incidents to a ferry. The profits of this ferry were originally 40*l.*; why is it not contended that the government might have taken all the excess afterwards, on the ground that they did not intend to give more than that sum? If they may take back a part of what is granted by implication only, they may the whole.

The defendants however contend, that it can be made out by authority, that the ferry is limited to the landing-places, and a case in Saville is referred to as overturning the doctrine of Kent and others before named. The question there was, whether the

owner of a ferry had any right to the water, except to navigate it. We contend for no other right. "A ferry is in respect to the landing-places," means only that there must be a place to land. Com. Dig. *Piscary B.*

The grant in 1640 was not of a ferry *de novo*, but of a franchise already in exercise. What were its rights at that time? History shows that it was the sole ferry between Boston and Charlestown, and that it was in the hands of a lessee of the government at a rent of 40*l.* a year. Could the government have granted another ferry between these towns, to be used before the lease to Converse had expired? The lease gave him "the ferry between Boston and Charlestown, to have the sole transporting of passengers and cattle from one side to the other."

If this were doubtful, are we to forget that there has been a long continued usage showing the extent of the grant? No rival ferry was attempted to be set up during the space of 145 years. In *Blankley* v. *Winstanley*, 3 T. R. 279, a usage under a charter is considered as the true exposition of the extent of the charter, and it is there held to override a by-law. In 1785, the college, if they had not assented to the erection of Charles river bridge, might have sued the plaintiffs, and their charter would not have protected them. *Chadwick* v. *Haverhill Bridge*, 2 Dane's Abr. 686. In *Tripp* v. *Frank*, 4 T. R. 668, it is conceded, that if it had been the duty of the plaintiffs to transport all passengers from Kingston upon Hull, to Barrow, as well as to Barton, they would have been entitled to all the tolls. So here, we are obliged to transport all passengers between Boston and Charlestown, the termini of our ferry, and our rights are commensurate with our duties.

Next; if the college had, in 1785, the right of the ferry to the extent above claimed, we are to consider what was the character of the transaction which took place in that year. It is entitled to receive a reasonable construction; such as will protect the parties to it, and carry their intent into effect.

The petitioners for a bridge could not erect one without the consent of the college, as it would have been a nuisance to the ferry; the college had no authority to build one to the obstruction of the navigable waters, as it would have been a usurpation

against the government, and the government had not the power to take away the ferry-tolls from the college. There were three parties then, neither of which could alone erect the bridge. The petitioners therefore were obliged to obtain from the government a license to obstruct the navigable waters, and from the college, a right to take the toll. Under these circumstances the act of 1784 was passed. The college were a party to the act; that is, they assented to it. A subsequent ratification implies a previous assent. It was not necessary that they should be named as a party in the act itself. They stop their ferry-boats, and accept of the annuity provided for them by way of compensation. This was a ratification, and in connexion with the act, was a conveyance of their right in the franchise, to the plaintiffs for the term of forty years, and to the government ever afterwards. The conveyance was founded on a consideration, in respect both to the college and the commonwealth; an annuity being granted to the one, and a public benefit conferred on the other, at the plaintiffs' expense. It has been said that the annuity was payable out of the tolls, and so the consideration proceeded from the public. On the contrary, the act makes it an absolute charge on the plaintiffs, and it must be paid even if their bridge should in any way be destroyed or rendered unproductive. We admit that there is no assignment in the forms of the common law; but the transaction is not to be looked at in a technical view; the intent of the parties is to be regarded. It is a case of substitution of one person to another as owner of the ferry, through an act of the legislature, which is binding on all persons who assent to it. The transaction may be considered as a purchase and surrender of the ferry to the use of the plaintiffs for forty years, with a reversion to the government, the plaintiffs paying the college an annuity of 200*l.* during the term, and the government making a reasonable compensation afterward for what would have been the income of the ferry.

The case in Palmer, 78, is in point. If the legislature had said, 'whereas the college have a ferry, now leave is granted to them to build a bridge,' the bridge would have the same extent of right as the ferry. It would be merely substituting one mode of transportation for another; like sail-boats for row-boats. So

that the plaintiffs, holding the right of the college, have the same extent of franchise, as if the college had been authorized to substitute a bridge for their ferry.

But we need not rely on the ground of a transfer of the ferry. We stand upon a grant from the legislature; and if necessary, the Court will refer to the ferry, or suppose that our charter refers to it, as descriptive of the extent of the grant.

We say that the recent act, incorporating the proprietors of Warren bridge, impairs the rights vested in us by our charter. Our property is taken from us, without any suitable provision for compensation.

It is unnecessary to argue that an act of the legislature, impairing the obligation of a contract, is unconstitutional; or that a grant is a contract. The whole ground is covered by the cases of *Vanhorne's Lessee* v. *Dorrance*, *Fletcher* v. *Peck*, *New Jersey* v. *Wilson* and *Dartmouth College* v. *Woodward*. This last was the case of a charity for public objects, and it was argued that the government might therefore control it; but the answer was, that the plaintiffs were a private corporation, though for the benefit of the public. The franchise now in question is granted to a private civil corporation; not to a public corporation over which the legislature have a control. In 4 Wheat. 669, in speaking of canal, bridge and turnpike corporations, *Story* J. says, "In all these cases, the uses may, in a certain sense, be called public, but the corporations are private; as much so indeed as if the franchises were vested in a single person." Any notion, therefore, which may be entertained, that the grant of our bridge is connected with the public benefit, is of no consequence. The question concerns a franchise. We contend that the late act is a resumption of a part of a franchise, and all argument about a free course of legislation is irrelevant; it is a question of right.

The same rule of construction prevails in a question between the government and their grantee, as between individuals. In a case of contract, they stand on equal ground. The rule as to grants of the crown being construed in favour of the crown, is explained in the Dartmouth College case. If on the solicitation of a party, a grant is made injurious to the crown, it is consid-

ered that the king was deceived; and hence the practice of inserting the words *mero motu* in crown grants, in order to entitle the grantee to a more liberal construction. But the application of the rule to parliamentary grants, was questioned by *Eyre* C. J. in *Boulton* v. *Bull*, 2 H. Bl. 500. Ours is a grant of that sort. And besides, the English rule was never adopted in this commonwealth.

The plaintiffs being a private corporation, from the nature of the case, our grant must be exclusive to some extent; and this is a question of construction. The charter allows the erection of a bridge "in the place where the ferry between Boston and Charlestown is now kept." The plain implication is, that the bridge was to be a substitute for the ferry. Had the words been "in place of," that is, expressly as a substitute, they would not have been stronger. "Where the ferry is kept," is descriptive of the franchise. It is immaterial whether we do or do not make out a privity between the proprietors of the ferry and those of the bridge. Without such privity, the act authorizing the erection of a bridge in the place where a ferry is kept, gives the same local extent. Our grant either has no extent beyond the width of our bridge, or it has the common law extent, of keeping down injurious competition, or it has the same extent as the old ferry. If we can go a single foot beyond our planks, there can be no question in this case. All the arguments showing that a ferry generally, or this one in particular, is exclusive to a certain extent, apply equally to the bridge, indeed with greater force, because a greater outlay of capital was necessary in the case of the bridge, and greater risk was incurred.

Assuming, what seems to be admitted, that if the defendants were acting merely as individuals, without any license from the legislature, they would be liable to us in an action for a nuisance, (and yet if we cannot go beyond the length of our planks, it should seem to be doubtful,) the question is, whether the legislature could authorize them to build their bridge. In our view, if an action would have lain, it is impossible to maintain that an act of the legislature can protect the defendants. By no construction can it take from the plaintiffs any right which they could before have enforced.

It is admitted that this franchise is private property, and that the Warren bridge takes two thirds of our income. The whole effect of the recent act is to take the fruits and profits of the franchise; for it is clear, that it does not resume the license to obstruct navigation. It is a mere question of money between the treasurer of the commonwealth, and the proprietors of Charles river bridge. As soon as the proprietors of the Warren bridge shall be reimbursed their expenses, the tolls received at that bridge go to the government. The legislature put their hands into our toll-dish and take the lion's part. They in effect say, this is a day of free competition, and we will enter into competition with you for the money in your till. If there were no constitution, such an act could have no force.

The legislature cannot grant what they do not possess. The confusion in this case arises from considering these acts of the legislature as laws; whereas they are grants, which are wholly different. A law is a rule prescribed for the government of the subject; a grant is a donation. In laws, the last in order of time repeals the first; in grants, the first stands unaffected by the last. Every grant supposes that the grantor has parted with his right, and that he will not re-assert it. The question then is, whether the defendants are protected by their act of incorporation in doing what they have done; if they are not, their bridge may be abated. We say that a right to build and maintain a bridge for the time stated, with a right to keep down contiguous and injurious competition, has been granted to us; and if the legislature meant to grant to the defendants a franchise within those limits, they have attempted to grant what they had before granted to us. If our franchise does not extend above the supposed franchise of the defendants, we have no ground of complaint. The case of *Jackson* v. *Catlin*, 2 Johns. R. 248 and 8 Johns. R. 406, establishes the principle, that the terms used in a legislative grant, must, as in other grants, be construed with reference to the power of the grantor, and must be considered as not granting what the legislature had not to grant.

But it is said that in England, after a writ of *ad quod damnum* executed, a grant of a second market &c. will be valid,

and that as we have no such process, a second grant without such a writ will be sustained. [C. J. Or rather, that the course of proceedings before our legislature is equivalent to an *ad quod damnum.*] An *ad quod damnum* is a *judicial* process, by which inquiry is made upon the oath of honest and lawful men, whether setting up a market &c. will be to the damage of the king or others, and if to the damage, then to what damage. There is nothing of this sort before a committee of the legislature. By the constitution, the legislature cannot exercise judicial powers. We have a better protection. The jury is our *ad quod damnum.* We have usually in our acts a provision for indemnity to persons injured, and for a trial by jury: and this is the course now generally pursued in England. It has been decided, that a legislative act appropriating private property to public uses, is void, unless it contains a provision for a simultaneous compensation. This Court have preceded, and the court in New York have followed, in establishing this principle; and the reason is, that there is no security in legislative justice, but by holding such acts to be void. The inquiry by the legislature, the supposed *ad quod damnum* which is to settle our right, is by the party who are to derive a benefit from stripping us of our rights. The legislature cannot go further than to say, that a measure will be of public convenience and necessity; if they are to determine that it will not prejudice private rights, and such decision is to be conclusive, the provision in the constitution is nugatory and inoperative.

But the counsel mistake in regard to the English law of *ad quod damnum.* A grant after the execution of such a writ, is not conclusive of the right of the grantee. *Mosley* v. *Walker*, 7 Barnw. & Cresw. 41, and *Mosley* v. *Chadwick*, ibid. 47, note; Hale *De Portibus Maris*, in Hargr. Tr. 59. But it is proper that such writ should be issued, in order that the king may not act without apparent reason. He would not intentionally grant what does not belong to him, and thereby put the true proprietor to his action. But the doctrine is made clear by the provision for a *scire facias*, at the suit of the party, to repeal the second patent, where the same thing has been granted to two patentees. If a *scire facias* will be issued in such case, *a fortiori* will an action lie while the second patent remains unrepealed.

But however this may be, it is plain, that the legislature of Massachusetts cannot make a grant which shall be conclusive of the right of the grantee. By the constitution, on a question of property, every subject has a right to a trial by jury; and if so, how can a hearing before a committee of the legislature be supposed to be conclusive? The defendants say, that our property has not been taken; that what we call property, is not property. We have a right to a judicial trial of that question.

Then is property taken by the government from the plaintiffs by the late act? The constitution does not say *land*, or *real estate*, or *personal estate*, but it uses the most general word, *property*. Is a franchise property? The sum of 20,000 dollars a year is taken from the plaintiffs. Is this property? If the defendants had taken this without a license from the legislature, it is admitted that we should have had a right of action; and for what? for property. It is said on the other side, that our property is not taken, but that our complaint arises from a justifiable use of the public's property, and that our loss is *damnum absque injuriâ*. Not so. Suppose our franchise, to the extent which we claim, had been limited by monuments on the banks of the river, and the legislature, reciting a public exigency for another bridge, should thereupon authorize a bridge within those limits; would it not be appropriating our franchise in whole or in part? And if so, it is an appropriation of property. They take our franchise, and the proceeds of our franchise. Both are property. The franchise may descend or be conveyed, and in other respects has the incidents of property. The provision in the constitution as to taking private property for public use, is to be construed liberally, or at least fairly for the subject. Our franchise is clearly taken by the recent act. Is it not appropriated to the *public* use? If not, the legislature had no right to take it at all.

But further, we contend that the power of the legislature to pass such an act as the one in question, is taken away by the constitution of the United States.

A grant is admitted to be a contract. The defendants say our charter is a mere license to build a bridge. Be it so; a license is a contract. Our grant or license is for a valuable con-

sideration; for services to be rendered. It operates as a covenant for quiet enjoyment.

As the legislature could not make a grant inconsistent with a previous grant, the defendants must say, either that our franchise does not extend beyond the planks of our bridge, or that the legislature retained a tacit right to resume their grant. There is no evidence of such a reservation. Suppose our limits up and down the river had been defined; could the legislature, upon any tacit reservation or supposed public exigency have granted other bridges within those limits? It will not be asserted. And yet in fact such limits are fixed. The words of the grant, by necessary implication, limit the distance to which our franchise shall reach; and if not, the law settles the extent. If the tolls of a ferry or bridge are not fixed by the grant, the grantee may take reasonable tolls. So there must be a reasonable construction as to the extent of the franchise. The law says, a rival ferry or bridge shall not be set up so near as to take away the custom. And this too is to be construed reasonably. If we have any exclusive right beyond our planks, it must cover the place where the new bridge is erected. The direct and necessary effect of the new bridge is to take away our custom, construing these terms most favourably for the defendants.

There would be more reason to contend, as a matter of public necessity, that our bridge should be removed as obstructing navigation, than that our money should be taken. But whatever might be the plea of necessity in that case, the right of navigation, the *peculiar* right of the government, is not resumed; while our money, the fruits of our franchise, which could in no way be affected by the public exigences, is taken from us. It is said our doctrine would obstruct public improvements. That we deny. If another bridge was wanted, it might have been had, without involving the necessity of taking away our revenue. The government might have built it at our expense, and let us take the tolls.

The question of public necessity requiring another bridge, is not now open. We deny the fact, and we deny the competency of this Court to try the question of convenience, or the effect of it, if proved. Public necessity is apt to be public feeling, and on this rock we are in danger of making shipwreck of

the bill of rights. In *Martin* v. *Commonwealth*, 1 Mass. R. 357, *Parsons* says, that prerogative is more dangerous in a popular government than in a monarchy; that in England, it is the cause of one against the whole, here it is the cause of all against one; and therefore here it is of more importance that judicial courts should watch the claim of prerogative more strictly. In *Newburgh Turnpike Co.* v. *Miller*, 5 Johns. Ch. R. 109, which was the case of a turnpike road, Chancellor *Kent* lays out of view all considerations of public convenience or necessity, "as altogether inapplicable to the question of right." In *Mosley* v. *Walker*, 7 Barnw. & Cresw. 52, Lord *Tenterden* says, "If the ancient market has been held in the public street, can we say that because population and commerce have increased, and that a greater number of carriages pass through the street in modern times than passed in ancient times, the lord, therefore, is to lose his franchise?" We take private property for public use more freely in this country than would be tolerated in England. We take it even for speculation.

In regard to the compensation provided for in the act of 1827, it is to be made to any person or corporation whose *real estate* shall be taken by the defendants. The word *property*, which is the constitutional word, is said to have been excluded *ex industriâ;* at any rate, it is not in the statute. On examining the precedents of private acts in England, in similar cases, it will be found, that in regard to indemnity to persons whose rights are affected, they embrace every species of interest.

But it is contended on the other side, that the legislature have not taken away any right belonging to us. On what ground then do they require the Warren bridge to pay half of the annuity to the college? Why make those proprietors pay our debts, if they have not taken our property? It would be difficult to find in the history of our legislation an act like this. The legislature acknowledge, on the face of the act, that our right is taken, and they undertake to debar us from a trial by jury, and to judge themselves of the compensation to be made to us. They direct the annual sum of 100*l.* to be paid for us, and they take from us the annual sum of 20,000 dollars.

In case the Court shall think that our rights are invaded, it will not be necessary to destroy the new bridge. The decision need not run against the public convenicnce. The bridge may be allowed to stand, as the legislature have given their consent to the obstruction of navigation, and the Court can adjudge the defendants to be our trustees. Such a decree would perhaps lead to an agreement between the parties.

Some general remarks have been made, to show the solicitude of courts not to overturn a legislative act, unless its unconstitutionality is manifest. Certainly if a judge has doubts, they will weigh in favour of the act. But it should be considered, that all cases of this sort will involve some doubt; for it is not to be supposed that the legislature will pass an act which is palpably unconstitutional. The correct ground is this, that the Court shall interfere and declare an act to be void, where the case, which may have been doubtful, shall be made out to be clear by examination. Besides, members of the legislature sometimes vote for a law, of the constitutionality of which they are in doubt, upon the consideration that the question may be determined by the judiciary power. This act of 1827 was passed in the house of representatives by a majority of five or six votes. We could show, if it were proper, that more than six members voted for it because the unconstitutionality of it *was* doubtful; leaving it to this Court to determine the question. Now if the legislature are to pass a law because its unconstitutionality is doubtful, and the judge is to hold it valid because its unconstitutionality is doubtful, in what a predicament is the citizen placed. The legislature pass it *de bene esse;* if the question is not met here and decided upon principle, then the responsibility rests nowhere, and the constitutional provision for annulling an act, instead of a shield, is a sword. It is the privilege of an American judge to decide on constitutional questions. It has raised the dignity of the judicial station. Without entertaining an ill opinion of legislative bodies, it is no disparagement of them to say, that judicial tribunals are the only ones suitable for the investigation of difficult questions of private right.

The case was continued *nisi*, and during the November term 1829 the judges delivered their opinions *seriatim*.

Morton J. The plaintiffs, in their bill, complain that the defendants are engaged in erecting a bridge across Charles river, which, when erected, will divert the travel from the plaintiffs' bridge, and as to them will be a nuisance. And they pray for a perpetual injunction against the defendants, to restrain them from completing the bridge which they are employed in constructing, and also from suffering passengers to go over the same.

When the bill was filed, the plaintiffs moved for an immediate injunction to prohibit the defendants from further proceeding in the construction of their bridge, until they should file an answer to the bill and there should be a hearing and final decision upon the merits of the case. This question was fully argued and duly considered by the Court. And it was determined, that under the statute of 1827, *c.* 38, "giving relief in equity in cases of waste and nuisance," this Court had jurisdiction of the case, and possessed the power to grant injunctions to prevent the creation of nuisances, as well as to abate them when created; but that the present was not such a clear and incontrovertible case of nuisance, or one of such urgent necessity, as to call for the exercise of that extraordinary power which must necessarily be founded on a prejudication of the case. No further opinion was then given or formed in relation to the important question now presented for our consideration, than that it was not so clear and easy of solution as to admit of even a temporary decision, without an answer from the defendants, and a full hearing upon the bill and answer.

Since the commencement of this suit, the defendants' bridge has been completed and is in use. The effects which the plaintiffs apprehended from it have been fully realized, in the diversion of a large portion of travel from their bridge.

The early measures adopted to restrain and prohibit the erection of the new bridge, fully apprized the defendants of the grounds and extent of the plaintiffs' claims. And the defendants, with full knowledge of the question raised in relation to their authority, having chosen to proceed rather than await the decision of this tribunal, have placed themselves upon their strict constitutional rights, and can have no reason to complain or expect sympathy, should their authority turn out to be void,

their bridge be decided to be a nuisance, and a forcible abatement of it by the arm of civil power, be decreed.

The Warren bridge, being over a navigable river or arm of the sea, is clearly a nuisance, unless authority to erect it be derived from the commonwealth. But if unauthorized, it is a nuisance of such a public nature, that the plaintiffs cannot complain of it, in this form, unless their rights are injuriously affected by it. A public nuisance is the subject of indictment, but not of private action at law or in equity, unless special damage be sustained.

An authority to erect a bridge over navigable waters may be valid as to the public, so as to bar an indictment and prevent an abatement of it as a public nuisance, and yet be void as to individuals whose property is destroyed or private rights violated by it.

It appears by the bills as well as answers, that the Warren bridge was erected under the authority of an act of the legislature of the commonwealth. And it is not pretended that the defendants have failed to avail themselves of the provisions of the act, or in any way varied from or exceeded the powers vested in them by it.

The question which is distinctly presented for our decision, and which must necessarily be directly met in the adjudication of this case, relates to the validity of the defendants' charter. Is the "Act to establish the Warren Bridge Corporation," passed on the 12th of March 1828, valid and operative, or null and void? It purports to authorize the construction of a bridge over the navigable waters of Charles river. It is an act of the highest legislative power of the commonwealth, and must have force as a law, unless the legislature, in passing it, transcended their powers, or unless it contravenes some express provision of the constitution of this state or of the United States.

It is an axiom in our government, that all legitimate power emanates from the people. Legislators act by delegated authority, and only as the agents of the people. The constitution contains the grant of their powers. If they exercise any not contained in this instrument, it is usurpation. And such acts are void for the want of authority to make or pass them.

Navigable waters are public property, and the superintendence

and regulation of them and of all other means of communication between different parts of the commonwealth, clearly come within the general powers vested in our legislature. Grot. *bk.* 2, *c.* 3, § 9; Vattel, *bk.* 1, § 100, 244; 1 Bl. Com. 264; 2 Inst. 624; 1 Hawk. P. C. *c.* 76, § 1; Hale *De Jure Maris*, *bk.* 3, § 9. The grant of the charter of the Warren bridge is therefore within the general scope of legislative authority, and is not a case of excess of power. So far as the charter operates as a license to throw an obstruction across a navigable river, and so far as the public interest is concerned, it seems to be a valid act. Whatever may be the opinion of the Court as to its effect upon the plaintiffs' rights, the defendants ought to be protected from a public prosecution, and this elegant specimen of convenience and skill in this branch of architecture be spared from a forcible abatement as a public nuisance. Should the plaintiffs prevail, it is hoped the court will find some adequate mode of redress consistent with the preservation of this great public accommodation.

The act incorporating the proprietors of the Warren bridge contains in itself no provisions prohibited by the constitution; and having been passed in pursuance of the general powers vested in the legislative department by the people, it can be avoided only by showing that there existed in this particular case some extraneous constitutional impediment to its enactment. If such impediment exists, it must have been created by the legislature itself. Having been invested with the power, it could not be divested but by its own act, or an act of the sovereign power of the people in altering the constitution itself. The legislature can divest itself of power and bind successive legislatures, only by some act in the nature of a compact. If one legislative body makes a valid grant or contract of any kind, it would be inconsistent with the first principles of natural justice, as well as of constitutional law, for a succeeding legislature to resume the grant or avoid the contract.

The plaintiffs claim under a grant from the government, either immediately to themselves, or derived to them through the medium of Harvard College. That these grants vested in the respective grantees, beneficial interests, and constituted

contracts between them and the commonwealth, is too clear and well settled to be questioned. *New Jersey* v. *Wilson*, 7 Cranch, 164; *Terrett* v. *Taylor*, 9 Cranch, 49; *Dartmouth College* v. *Woodward*, 4 Wheat. 560.

The plaintiffs contend that the defendants' charter is invalid, because it is inconsistent with the last clause of the tenth section of the constitution of the United States, with the fifth article of the amendments to the same, and with the tenth article of the declaration of rights of this commonwealth. They attempt to show that the grant to the defendants impairs the obligation of the contract existing between the commonwealth and themselves; and also that their private property has been taken and appropriated to public uses without a just and reasonable compensation.

Whether the grant to the defendants interferes with the vested rights of the plaintiffs under the former grants, must depend upon the true construction of the several acts of the legislature making those grants.

The plaintiffs claim an exclusive right to take toll of all persons passing over Charles river between Charlestown and Boston. This right they derive to themselves in two ways. First, by a legislative grant to Harvard College and an assignment by the college to themselves. Secondly, by a direct grant from the government to themselves.

In relation to the first branch of the subject two inquiries naturally suggest themselves. First, what was the extent of the grant to Harvard College, and what did the grantees take under it? Secondly, has the right or interest which the college took, whatever may have been its extent, passed to the plaintiffs?

The grant to the college, as made, confirmed and explained in several legislative acts, was of a ferry, or of the income or revenue of a ferry. The import and meaning of these several ancient acts have been fully discussed, and several questions raised in relation to them, which it will be proper briefly to consider.

Whether we refer to the act of 1640, which purports to be a direct grant of the ferry, or to the subsequent acts recognizing and confirming the former grant, as of the income or revenue

of the ferry, it is manifest that some permanent indefeasible interest was intended to be passed, and did actually vest in the college. To construe these acts into mere gratuities or donations during the pleasure of the legislature, would be equally irreconcilable with the beneficent objects which they have in view, the terms of the acts, and the practical construction of them for more than a century and a half.

Ferries in this country, as well as in England, are the subject of property, and like other incorporeal hereditaments, are capable of transmission by grant or devise. In England their original source is the prerogative of the Crown. *Churchman* v. *Tunstal*, Hardr. 163. But in this state they can only be derived from the legislature.

In the further discussion of this subject I shall proceed upon the assumption, that the franchise of the ferry was the property of the college previous to and until the grant of the plaintiffs' charter.

The extent of this franchise or right must depend upon the construction of the act by which it was created. And it is apparent from an examination of the several acts and the usage under them, that the college took and held the franchise subject to the general superintendence and regulation of the legislature of the commonwealth. Neither the management of the ferry, nor the number of boats to be employed, nor the rate of toll, is established in either of these acts. Was the power to regulate these subjects granted to the college, or reserved to the legislature? If the former, then public convenience, so far as related to the transportation across the river by this ferry, was made to depend upon the pleasure of an interested corporation, instead of the sovereign power of the state. It cannot be supposed, that the college had the exclusive right to the transportation across the river, and also the unlimited power to fix the rate of toll for such transportation.

The college, in accepting the right granted, assumed corresponding obligations. If they were to receive the profits of the ferry, they were bound to furnish reasonable accommodations for the public; to submit to the general regulations of ferries throughout the state; and to take such just and reasonable toll

as from time to time the legislature should establish. Such seems to be the tenure by which ferries were generally holden, except in cases where the toll or other stipulations were fixed in the grant.

The grant of a ferry confers on the grantees an exclusive right, but the extent of the right must depend upon the terms of the grant.

The grant of an exclusive right to take toll at a ferry, or bridge, or turnpike, is not a monopoly, which is deemed so odious in law, nor one of the particular and exclusive privileges distinct from those of the community, which are reprobated in our bill of rights. The grant is upon a condition precedent, which requires the performance of services beneficial to the public, before the right to take toll vests.

In all cases the legislature may make the grant more or less exclusive, and more or less extensive, according to their opinion of the expediency of the measure or the necessity of the case. Originally, the legislature might have established a ferry with an exclusive right to the transportation of all passengers across Charles river in its whole extent, or one with the right to all the transportation between Charlestown and Boston, or several between those two towns, each with a right only to take toll of such passengers as might choose to use it.

This, though an *ancient*, is not a *prescriptive* ferry. Co. Lit. 115 *a*; *Hull* v. *Horner*, Cowp. 102. Its commencement is clearly shown. But prescription always presupposes a grant; and I can perceive no difference between the two, except in the mode of proof. In prescription, the proof is by the use, and the right presumed to be granted is co-extensive with the use. If the grant itself be produced, the extent must be determined by the terms of the grant. In the case before us, if a prescription had been shown for the college to transport across Charles river all passengers between Charlestown and Boston, it would have been evidence that a grant to that extent had been made. So if a deed, conveying the same exclusive right, had been produced, it would necessarily have established the same right in the college. The only difference would have been in the mode of proof.

The grant to the college is of record. The history of the origin and continuance of the ferry is well known, and clearly shown in the exhibits filed in the case.

In 1630, the governor was ordered to permit the first applicant "to set up a ferry betwixt Boston and Charlton," at a certain rate of toll.

In 1633, Mr. Brown was allowed to keep a ferry over Charles river against his house. Whether this was instead of, or in addition to the former proposed ferry, does not clearly appear.

In 1635, a ferry was established "on Boston side to transport men to Charlton and Winnesimet."

In 1637, the governor and treasurer were empowered to let the ferry between Boston and Charlestown at a rent of 40*l.* *per annum*, for the term of three years. In pursuance of this authority the ferry was let to a man by the name of Converse.

In 1638, "a ferry is appointed from Boston to Winnesimit, Noddle's Island and the ships—the person to be appointed by the magistrates of Boston."

In 1640, the treasurer and others were empowered "to let the ferry between Boston and Charlestown to whom they pleased; after the expiration of the subsisting lease" to Converse.

In August 1640, "the ferry between Boston and Charlestown is granted to the college."

In 1654 and 1655, the existence and validity of the grant is recognised and continued under the name of the profit or rent of the ferry.

It is manifest that the right of the college to the ferry was not founded on prescription. And the plaintiffs cannot now call to their aid any principles or reasoning peculiar to this kind of title, or any rules of evidence applicable to this mode of proof.

By the grant to the college it is contended, that the exclusive right of transportation between Boston and Charlestown passed. The case of *Tripp* v. *Frank*, 4 T. R. 666, is relied upon to support this position. But a very cursory examination of that case will show, that the plaintiffs can derive no aid from it, in support of their construction of this grant. That was a case of *prescription*, and not of express *grant*. In that case the plaintiff proved an exclusive *prescriptive* right to the transportation of persons

across the Humber between Hull and Barton; but in this, the question in controversy is, whether the exclusive right of transportation between Boston and Charlestown was granted or not. In that, the exclusive right between the two towns was not disputed, but the only question was, whether a transportation from one of those towns obliquely across the river to another town two miles lower down, was a violation of the plaintiff's exclusive right. The court held that it was not, and that the transportation across the river from one of those towns to any point above or below the other, unless done to avoid the plaintiff's ferry and in fraud of his right, was not an infringement of his franchise.

What then is the true meaning of this grant to the college?

It was not the creation of a new franchise, the extent and limits of which were then to be established; but it was the grant of an old one, with its then existing rights and privileges. The terms "the ferry," as used in the grant, clearly recognise its pre-existence. No new rights or privileges were then added, nor was there any attempt to fix or define the old ones. But it passed just as it existed at the time of the grant.

The prior acts creating and regulating this ferry are so brief and general, that it is very difficult to ascertain the precise meaning of them, or the extent of the franchise which was thereby granted. Indeed it is not probable that any definite limits were intended to be affixed to it. This seems to me to be a case in which usage and a contemporary practical exposition of the grant are admissible evidence, and furnish a pretty safe guide in its construction. That the tendency of this evidence, so far as we have gone into it, is to support the exclusive right to the extent claimed, I think cannot be doubted. But upon this it is not necessary to give an opinion, for the view which I take of the subsequent facts of the case renders a decision of this point, or the further investigation of this part of the subject, unnecessary.

For I am clearly of opinion, that the franchise of the ferry, or the right of the college in it, whatever might have been its extent, never passed to the plaintiffs. And further, had it passed, I think they could not avail themselves of it in support of this bill.

The right of the college did not vest in the plaintiffs. The act of the legislature did not pass it. The legislature itself had no power to transfer it. It could only pass by the act of the corporation of Harvard College. The constitution no where invests any branch of the government with the despotic power of transferring the property of one man or corporation to another. Such an act would be subversive of the principal ends of government, of the fundamental laws of the social compact, and of the principles of reason and moral rectitude, as well as irreconcilable with the letter and spirit of our national and state constitutions. And the legislature could no more take private property from one person and vest it in another, with an indemnity, than without one. It is only in case of public exigency that private property can be taken, and then only for public use, and upon making a just and reasonable compensation. There is not the slightest evidence of any intention or attempt on the part of the legislature, to transfer any property or right of the college to the proprietors of Charles river bridge.

If the plaintiffs ever acquired the franchise of the ferry, it must have been by purchase. This incorporeal hereditament could only pass by deed. There exists no written instrument under seal, and it is not pretended that there is any legal conveyance of this estate.

It is true, that in equity an agreement to convey might be holden to be equivalent to an actual conveyance. But where is the evidence of any contract between these parties? It is not in writing. And I have seen no proof of any kind, that any negotiation or treaty was ever entered into between them. There is, in short, nothing in the original application for the charter of Charles river bridge, in the proceedings upon that application, in the transactions of Harvard College, or in the plaintiffs' act of incorporation itself, which has the slightest tendency to convince my mind, that there was any intention or desire in any of the parties to make a contract of sale or a transfer of the franchise of the ferry.

The charter of the Charles river bridge was a compact. The parties to it were the commonwealth on one part and the corporation on the other. The charter itself does not purport

to convey the franchise of the ferry, or to vest in the corporation any right appertaining to a ferry. The college was no party to it, and its validity did not depend upon any act of the college. Its assent would not give life to the charter, nor would its dissent defeat it.

If the plaintiffs are the owners of the franchise of the ferry, what will become of their ferry right at the expiration of their charter? Will they then have a right to put the ferry in operation again, and complain of the old bridge for interfering with these rights? Their charter answers these inquiries. The bridge will revert to the commonwealth, and no ferry right can prevent the use of it in such manner as the legislature shall direct. If the plaintiffs had been the proprietors of the ferry, in accepting the charter of the bridge they must necessarily have surrendered the franchise of the ferry, or it would have become merged in that of the bridge.

The grant to the plaintiffs was inconsistent with the vested rights of the college, and destructive of their private property. The bridge was to be erected upon the *ferry-ways*. They both could not exist together. The act of the legislature directly interfered with the use of the franchise of the ferry. But in my opinion it was a justifiable interference. The public exigency required, that the property of the college should be taken for the public accommodation, and a compensation was provided, which the college accepted, and of which they never have complained as being unreasonable or unjust. *Perry* v. *Wilson*, 7 Mass. R. 395; *Stevens* v. *Middlesex Canal*, 12 Mass. R. 468; *Vanhorne's Lessee* v. *Dorrance*, 2 Dallas, 304; *Marbury* v. *Madison*, 1 Cranch, 137; *Wilkinson* v. *Leland*, 2 Peters's Sup. Ct. R. 627; *Gardner* v. *Newburgh*, 2 Johns. Ch. R. 168.

When the ferry was established, and for a long time after, it was deemed a mode of conveyance sufficient for the public accommodation. But in about a century and a half the population and business of the two adjoining towns and of the surrounding country, had increased so much as to require a different mode of communication. Although at first the ferry might be deemed adequate to the public wants, yet it soon became ob-

vious, that the time would arrive when public convenience and necessity would demand a more easy mode of transportation. Of the time when such change became necessary, the legislature were the exclusive judges. They have determined it; and of their decision no one has the right, or, so far as I know, the inclination to complain.

I am therefore of opinion, that the legislature, having rightfully decided that the public exigency required that the franchise of the ferry should be taken, did seize it, after providing a suitable indemnity, not for the purpose of granting the same to the plaintiffs, but to enable them to make a compact by means of which the public wants should be satisfied in a particular in which the ferry was insufficient to answer that purpose.

The charter of the plaintiffs was rightly granted, and constituted a valid compact between them and the commonwealth, the import of which we shall hereafter consider. But it seems to me very clear, that there was no contract made by the plaintiffs, to which the college was a party, nor any other act done by the college whereby they transferred their right to the plaintiffs; that neither in law nor equity can the plaintiffs be considered the successors or assignees of the college.

But if they were, I cannot perceive how they could support their present bill on the right of the ferry. They never pretended to use the ferry. It has been discontinued for more than forty years. They do not complain of any loss of passengers in their ferry-boats, for they have none. Their ownership of the ferry would not have authorized them to build a bridge. *Pain* v. *Patrick*, 3 Mod. 294. Their authority to do this depends upon their charter, and the whole injury of which they complain, is the diversion of travellers from their bridge, and the consequent loss of toll. The plaintiffs must therefore rest the support of their bill solely upon the grant of the legislature to them.

This brings us to the consideration of their charter. By this certain exclusive rights are secured to them, and the question which we are now to consider is the extent of these exclusive rights. I have endeavoured to show, that upon the correct solution of this question the decision of this case must depend.

The act incorporating the proprietors of Charles river bridge was accepted by them. It then became a compact between them and the commonwealth. Neither party has any right to violate it.

The charter, which was originally limited to forty years, was, by a subsequent act, extended to seventy. That this extension was fairly and rightfully obtained, has not been questioned by the defendants' counsel in the present argument. And I have no doubt that it was duly accepted by the plaintiffs, and now gives them the same right which they would have possessed under their charter, had it extended seventy instead of forty years in its commencement. I shall therefore treat it as a subsisting compact, without reference to the period of its first limitation.

What are the terms of this compact? The corporation on their part bound themselves to erect and maintain, during the time limited in their charter, a bridge of the description, and according to the terms mentioned in the act, and to pay to Harvard College two hundred pounds annually during the same period. On the other hand, the commonwealth contracted, that the plaintiffs should have and enjoy during the same term the benefits and privileges of a corporate body, should hold and manage the bridge then to be erected, with all its privileges and advantages, as corporate property, and should have a right to demand and receive of all passengers over the bridge a specified rate of toll. These are the principal stipulations of the respective parties contained in the charter; and besides these there are no express covenants on the part of the commonwealth, bearing upon the question under consideration. There is no warranty that the channels of communication to and from the bridge should remain the same as they then were, or that the public business, legislative or judicial, should continue to be done in the same places it then was, and it is manifest, that any loss of travel by a change in either of these respects would be a damage to the plaintiffs, of which they would have no right to complain.

The plaintiffs are vested with an exclusive right to take the stipulated rate of toll, and the legislature have no constitutional power to reduce, alter or abolish it. But of whom are the plaintiffs entitled to receive this toll? Is it of all persons having oc-

casion to pass Charles river, or of all persons passing between Charlestown and Boston, or only of such persons as may actually pass over their bridge?

The right of taking toll is not co-extensive with the river itself, because at the date of the charter there was a bridge at Cambridge, and the charter must be construed with reference to the state of things at that time.

The act of incorporation does not limit the toll to the towns of Boston and Charlestown, nor is there any reference to the travel between those two towns, unless it be in the title of the act. There is no rule in construing statutes better settled, than that the title of an act does not constitute a part of the act. The charter itself does not describe the bridge as between Charlestown and Boston, but grants authority to erect "a bridge over Charles river in the place where the old ferry was then kept." These towns are not named, except for the purpose of describing the then existing ferry. There are therefore no words used in the charter, limiting the plaintiffs' right to the travel between those two towns.

The ferry was manifestly referred to for the purpose of fixing the place where the bridge should be located, and not with a view of defining the rights granted to the proprietors.

The inference seems to me to be unavoidable, that the grant must be construed either to vest a right to take toll of all passengers across Charles river below Cambridge bridge, or only a right to take toll of such persons as, under all the changes which the population, business and state of the country might undergo, should choose to pass at this bridge. In other words, that the exclusive right either extends from the mouth of the river to Cambridge bridge, or is limited to the bridge itself. If this be not a necessary alternative, I would inquire what points upon the river above and below the bridge can be fixed upon as the specific boundary of the plaintiffs' right? I have shown that the limits of the two adjoining towns do not constitute this boundary. It cannot be presumed that the legislature of the commonwealth would make a grant of a valuable franchise so vague and indefinite in its terms as to be unintelligible: nor can it be presumed that the grantees would accept such a grant. The presumption

is an impeachment of the discernment and forecast of the corporators as well as of the wisdom of the legislature. By adopting either of these alternatives we have a grant with definite intelligible limits. By rejecting them and seeking some intermediate point, we are left without any guide, and are compelled to depend on conjecture, or general notions of justice or expediency, which will be different in different individuals, to determine the extent of a franchise, which ought to be well defined and certain. If we are necessarily brought to choose between these two alternatives, which shall we adopt?

In the discussion of this subject, I think much aid may be derived from an examination of the charters of other private corporations. Bank incorporations, though not precisely analogous, are not entirely dissimilar. They owe and perform onerous duties to the commonwealth, which form a good consideration for the grants of their charters. They pay a heavy tax to the state, and make loans to it, when required by the legislature, at a lower rate of interest than is taken from other debtors.

The legislature might for a limited time, and upon proper considerations, grant to a corporation the exclusive right of banking within any town or county or throughout the commonwealth. And it was once contended by learned and respectable men, that the first bank-charter gave this extensive exclusive right. This opinion is undoubtedly an incorrect one, and is now generally exploded. And yet it seems to me, that the grant of a bank in a particular town has some points of similarity to the grant of a bridge across a river at a particular place or between two towns. If new banks are established in the same town or place, the old one suffers perhaps as much by injurious competition, as the proprietors of an old bridge by the erection of a new one across the same river or between the same towns. Some of the arguments in favour of an exclusive right are applicable to both cases. It is however well settled and indisputable, that a bank-charter does not contain any restriction upon the legislative power, which will prevent the establishment of rival institutions.

Turnpike charters are still more analogous. Perhaps it would be difficult to point out the difference between the rights

of bridge and turnpike corporations in this respect. Both are intended for the public accommodation by furnishing facilities for travel and transportation. The proprietors of both owe similar duties to the public. They are bound to keep them in repair and convenient for use, and both derive their support from the same source, viz. the tolls which they are authorized to levy. The charters of both ought therefore to be expounded by the same rules of construction.

How far have the proprietors of turnpikes an exclusive right? Is it a violation of their charters for the legislature to grant new turnpikes, or the county commissioners to lay out new roads, which will divert any portion of travel from them? If so, none of the older turnpike charters are inviolate, and very few of the more recent ones are valid. Scarcely a turnpike has been established in the state since the first, which has not diverted more or less of the travel from the former ones. Are these charters void? If a very small diversion of travel is not inconsistent with a former charter, how much will it require to render it void? Will one quarter, or one half, or three quarters do it? If it is a matter of right founded on contract, the slightest injury is as truly a violation of the contract as the greatest, even the entire destruction of the franchise. In relation to turnpikes, I can see no medium between the smallest diversion of travel, and the limitation of the grant to the turnpike road itself. Either the right is to receive toll of all persons who would pass over the road without any alteration of the public channels of communication, or it is only to take toll of such as may pass under any changes which the progressive improvements of the country may demand. I can entertain no doubt which of the two constructions ought to be adopted. Turnpike charters have received a practical exposition, which, though never sanctioned by judicial authority, has been long acquiesced in, and is believed to be a sound one. In many cases the legislature have established new turnpikes, some nearly parallel with and diverting travel to the injury and sometimes ruin of former ones. There never has been brought before any judicial tribunal, a question as to the constitutionality of these charters. But many adjudications have been based upon their validity.

There is no contract by the commonwealth, that no new charter shall be granted, which shall interfere with the business or profits of the old. And the legislature do not limit or restrict the power of their successors in establishing new corporations, wherever in their discretion they shall determine that the public good requires them.

In some cases, charters have been granted for the erection of bridges across rivers, over which none existed before. Does this give an exclusive right to all the travel over such rivers? And would the grant of a charter for a new bridge, over the same river, which should divert any travel, however small in amount, violate the first contract? It manifestly would not. If then a slight diversion of travel would not contravene the first charter, the exclusive right does not extend to the whole travel which would have passed over the first bridge if no new one had been erected. How near then must the new one be, and how much of the travel must it divert, to become a nuisance? It would, I believe, be difficult, if not impossible, to give a definite answer to this question.

Does the charter of a bridge or turnpike give to it an exclusive right to the *line of travel* which passed over it when first constructed? This is an indefinite and uncertain expression, and the line of travel is every where very fluctuating. But if it has any certain definition, it must mean the travel from all those parts of the country from which it passed at the time of the completion of the bridge or turnpike. A grant or covenant to this extent would amount to a stipulation, that the channels of communication and course of business, and in fact the state of society and of the country itself, should remain stationary. A change of the roads, the improving of an old, or the laying out of a new one, at a great distance from a bridge or turnpike, might affect the travel over it. The change of business or the opening a new market at one extremity of the state, might diminish the transportation over a bridge or road at the other. I think therefore that the extent of the exclusive right granted is in no case defined or limited by a reference to any particular line of travel.

If every turnpike and bridge charter contains a covenant or stipulation that no new turnpike or other road or bridge shall be made, which will divert the travel or diminish the profits of the old one, then deplorable is the state of almost every incorporation of this kind in the commonwealth. They have been acting and expending their money on the faith of void charters, and all their acts have been unauthorized, and so far as they interfered with the rights of others, were trespasses upon private property.

If the diversion of toll is inconsistent with an existing charter, it cannot be justified by legislative authority. The act authorizing it would impair the obligation of a contract, and be void by the constitution of the United States. Although the legislature may appropriate private property, may take the whole franchise of a corporation, when the public exigency requires it, by indemnifying the owners; yet a contract is deemed sacred, and the constitution nowhere allows the violation of its obligations, by any branch of government, for any exigency or upon making compensation for the injury. The supreme law of the land expressly and peremptorily interdicts the legislatures of the several states from passing any law impairing the obligations of contracts. Any legislative act, assuming the form of law, having this effect, is a nullity and a blank upon the statute book.

If therefore the different private charters in the commonwealth granted for the purpose of improving the state of the country and bettering the condition of the people, are to receive the extensive construction contended for, they amount to an entire prohibition of all further internal improvement during their continuance. No improved road, no new bridge, no canal, no rail-road can be constitutionally established. For I think, in the present state of our country, no such improved channel of communication can be opened without diminishing the profits of some old corporation.

It is vain to say that the new corporations may proceed in their enterprises of public utility, by paying to the old ones the damages which they sustain. I think I have shown that the diversion of toll is a consequential damage, which cannot be justified under the authority to take private property for public uses, and that if it is inconsistent with the provisions of a former charter, it

is void. If I have succeeded in establishing these two propositions, which seem to me to be extremely clear; then it necessarily follows, that such new corporations can exist only by the consent of the old ones; and may be restrained from proceeding or declared to be legal nullities, whenever the old corporations whose emoluments are diminished, shall choose to appeal to the equity jurisdiction of this Court.

If, however, such be the necessary and true construction of the charters granted by the legislature, *fiat justitia;* let the public faith be preserved inviolate; let the contracts of the government, according to their true import, be rigidly enforced. But if consequences so inconsistent with the improvement and prosperity of the state result from the liberal and extended construction of the charters which have been granted, we ought, if the terms used will admit of it, rather to adopt a more limited and restricted one, than to impute such improvidence to the legislature.

In the further examination of this subject, I am more fully convinced of the correctness of the position which I advanced in relation to the plaintiffs' charter, viz. that it either gave them the exclusive right to all the travel across Charles river below the Cambridge bridge, in the state in which the channel of communication between the metropolis and the surrounding country then was, or only the right to take toll of such persons as, under the changing and improving state of our country, should choose to pass their bridge.

If one or the other of these constructions must be the true one, then which shall we adopt? If the former, then every new bridge across the river, every turnpike and every common highway, which has diverted a traveller from the plaintiffs' bridge, has been an infringement of their chartered rights, and a violation of public faith. This construction would amount substantially to a covenant, that during the plaintiffs' charter an important portion of our commonwealth, as to facilities for travel and transportation, should remain *in statu quo*. I am on the whole irresistibly brought to the conclusion, that this construction is neither consonant with sound reason, with judicial authorities, with the course of legislation, nor with the principles of our free institutions.

It only remains for me to adopt the latter construction of this grant, and hold, that the plaintiffs' right, by virtue of their compact with the commonwealth, only extends to the taking of toll of such persons as may pass their bridge, and that this compact contains no covenant or agreement that they shall be entitled to a certain extent or particular line of travel.

This manifestly is the literal construction of the act and satisfies all its words.

The words are, "that a toll be and hereby is granted:" For whose benefit? "For the sole benefit of the proprietors." Of whom is it to be collected? Of passengers or persons passing the bridge. The act contains no covenant or stipulation as to the extent of travel, nor any limitation or restriction upon subsequent legislatures in relation to other charters or grants.

I have now endeavoured to show, that the act incorporating the proprietors of Charles river bridge contains no express grant of an exclusive right beyond the limits of the bridge itself, nor any covenant on the part of the commonwealth, that no new bridge shall be erected which shall diminish the profits of the old one. It only remains for me to consider, whether there is any such grant or covenant by implication.

The general rule is, that in governmental grants nothing passes by implication. Bac. Abr. *Prerogative, F.* 2; 17 Vin. Abr. *Prerogative, C. c; Blankley* v. *Winstanley*, 3 T. R. 288; *The Case of the Royal Fishery of the Banne*, Davies, 157; Finch's Law, 100; *Legat's Case*, 10 Co. 112; *The Elsebe*, 5 Rob. Adm. Rep. 162. In England, where such grants emanate from the prerogative of the crown, this rule is well established. "A subject's grant," says Blackstone, (2 Com. 248,) "shall be construed to include many things besides what are expressed, if necessary for the operation of the grant." "But the king's grant shall not enure to any other intent than that which is precisely expressed in the grant." If this is the rule under a monarchical government and in grants of the king, by much stronger reason ought it to prevail under a republican government and in legislative grants. It is much more applicable to agents of short continuance, than to hereditary officers. The commonwealth is the grantor, the legislature is the agent,

and the grant actually proceeds from the people in their collective sovereign capacity. Private charters are a limitation or restriction of legislative power, and are binding not only upon the legislators who make them, but upon their successors ever after. It is a branch of legislation in which the immediate actors, touching the subject acted upon, exhaust the whole power which has been committed to the legislative department, and thus leave their successors with less of sovereignty than they themselves possessed. I apprehend, however, that in England, and even in this country, the rule cannot be sustained in the full extent in which it is laid down by Blackstone, but must receive some qualification. But that public grants are to be construed more strictly and less favorably to the grantee than private ones, I believe will admit of no doubt. *Blankley* v. *Winstanley*, 3 T. R. 279 ; *Boulton* v. *Bull*, 2 H. Bl. 500.

Although exclusive rights for short periods sometimes encourage enterprises of public usefulness, yet generally their tendency is to impede the march of public improvement, and to interrupt that fair and equal competition which it has ever been the policy of our country to encourage. They are not, and never have been, favourites with our government, and are not to be presumed to have been granted farther than the express words of the grant will warrant.

Although no distinct thing or right will pass by implication, yet I do not mean to question that the words used should be understood in their most natural and obvious sense, and that whatever is essential to the enjoyment of the thing granted, will be necessarily implied in the grant. Co. Lit. 56 *a ;* Plowd. 317 ; *Saunders's Case*, 5 Co. 12.

The considerations which I have before offered for the purpose of showing that the plaintiffs' charter ought to receive a strict and limited construction, tend, with equal, perhaps greater force, to prove that it ought not to be extended by implication so as to include the extensive exclusive rights claimed by the plaintiffs.

The authority to build the bridge itself is granted by implication. But it is a necessary implication. Without it, the grant itself would be an absurdity and a nullity. Not so with the rights

claimed. The grant was of a franchise. This might be enjoyed under the construction which I hold to be correct, as well as under the more extensive one contended for by the plaintiffs. It is true the franchise would be more valuable under the one construction than the other. But the rule does not apply to the value. The grantees cannot claim any additional privilege or immunity because it will increase the value of the thing granted, but only where it is necessary to the enjoyment of it.

The case of the *Portland Bank* v. *Apthorp*, 12 Mass. R. 252, seems to me to be a strong illustration of the principle for which I contend. The Portland bank had a charter for a limited term, containing the powers, duties and liabilities of the corporation. During the continuance of the charter a tax of one per cent. per annum on the capital stock was imposed on all the banks in the state. The Portland bank resisted the payment of this tax, on the ground that the law imposing it was inconsistent with their charter, and as to them, inoperative.

They must have contended, and doubtless did, that they acted under a charter which was a contract with the commonwealth; that this contract did not require of them the payment of such a tax, but by necessary implication exempted them from all duties not specifically enumerated in the charter; that they were bound to continue their corporation during the period of its limitation; that the tax was a heavy burden; that they might not have accepted their charter with such a burden; and that it was a violation of the spirit, if not the letter of their contract, to compel them to perform duties which were not contemplated when they accepted their charter, and from which they could not relieve themselves by a surrender of it.

But these objections to the validity of the tax were overruled, and the Court held, that the charter contained no implied exemption from a general tax, which might be imposed upon any description of property of which they were owners. The legislature did not impose upon themselves any restriction in relation to the taxation of the property in the commonwealth. And the stockholders accepted their charter with a knowledge of the power of the legislature over these subjects.

In the case before us, the proprietors of Charles river bridge must be presumed to have accepted their charter with an understanding that the legislature possessed the general authority to make laws regulating the navigable waters, the mediums of communication, and many other subjects which might increase or diminish the value or profits of the franchise granted to them. No restraint upon this authority can be raised by implication. They must therefore have taken their charter subject to this authority, and have relied upon the wisdom and justice of the legislature, and not upon any provisions of their charter, to protect them from unjust and unreasonable competition. Whether in this respect they have reason to complain, we have no right to inquire or give an opinion. Our confidence in a co-ordinate branch of the government forbids a presumption so inconsistent with its dignity and the respect due to it.

That the plaintiffs' rights cannot be extended by implication beyond what is necessary to the enjoyment of the thing specifically granted, and that there is nothing in the case to favour the doctrine of implied grants or covenants, I think manifest—

Because the grant was made by agents appointed for short periods and with limited powers :—

Because the grant itself is a restriction upon the power of subsequent legislatures :—

Because the extension of the grant is in derogation of the rights and against the interests of the people :—

Because it tends to promote monopolies and exclusive privileges, which ever ought to be guarded against and restrained :—and

Because such constructions of existing grants would prove an insuperable obstacle to future improvements.

I am therefore of opinion, that the plaintiffs' charter does not contain, expressly or impliedly, any such grant or covenant as they contend for.

It may be urged against this construction of the plaintiffs' and other similar grants, that it will take from the grantees all encouragement to commence hazardous and expensive enterprises for the public benefit.

If I am asked what security they have that their reasonable expectations of remuneration will not be destroyed by the establishment of rival institutions, I answer, that they have security in the self-interest of individuals, who will never engage in expensive works without a prospect of remuneration. Unless it is believed that a new bridge or turnpike will be profitable to the proprietors, it will never be made to the injury of the old one. They have security in their confidence in the legislature; that, in consulting the good of the whole, they will not sacrifice or injure the property of one portion of the community for the benefit of another. And they have still higher security in the constitutional provision, that private property shall not be taken for public uses without a reasonable compensation. No new bridge, turnpike or common highway can be expected to be established without the taking of private property, and therefore no such new channel of communication can be opened, except where public convenience and necessity shall require it. If all these are not sufficient encouragement to public improvements and sufficient security against injurious or destructive competition, then I say that it was the fault of the grantees that they did not make a more favourable bargain, or that they acceded to an injurious compact. In all cases they may require an express grant of an exclusive right within certain limits, or a clear stipulation that no rival institution shall be authorized within a certain distance. Such provisions are often inserted in charters in neighbouring states, and there has been at least one instance in this commonwealth. In 1792 the exclusive right, for a limited period, of making a canal between Connecticut river and the metropolis, was granted to a number of individuals who were incorporated.

Although the correct exposition of the contract now under examination is very important to the parties to this suit and to other corporations now in existence, yet it is of little import in relation to the promotion of public enterprise, or in any respect in relation to charters hereafter to be granted. When the construction of this charter is settled, the parties to future ones will take care to insert such express provisions and stipulations as they shall deem promotive of the public good, and secure against any unreasonable private competition.

The duty which we are required to perform in the present case, is the most difficult and important which can fall to the lot of judicial officers. It is to revise, scrutinize and compare with the constitution and decide upon the validity of an act of the legislature of the commonwealth. For one branch of the government to re-examine the acts of a co-ordinate branch, and determine upon their conformity to the constitution under which both act, and to declare them valid or invalid according to its opinion of such conformity, is a high, delicate and invidious power; one which will no more be exerted in *doubtful*, than it will be omitted in *clear* cases.

The act under consideration, we are bound to presume, received due deliberation from all branches of the legislature. Of the expediency of passing it; of its bearing upon the interests of different individuals, corporations and sections of the state; of the public convenience and necessity which required the seizure of private property, they are the exclusive judges. And we have no more the inclination, than the means, of re-examining any of these questions. But upon its constitutionality we are bound to decide. If it clearly contravenes any constitutional provision, our duty is plain. The act is a nullity. But if this point is doubtful, our reluctance to exert so high and delicate a power, our respect for the legislature, and our confidence in a co-ordinate department of the government, would require us to give validity to its acts. For myself, however, I have no need in the present case to resort to this principle.

From the most thorough and deliberate examination which I have been able to give to the present case, I am fully convinced, that the act under which the defendants erected their bridge is not an infringement of the plaintiffs' rights, and does not violate any provision of the state or national constitution. I am therefore of opinion, that the plaintiffs' bill ought to be dismissed.

Wilde J. I concur in the opinion of my learned brother, and am fully satisfied with the reasons given to support it. This, however, being a case of great interest, not only to the parties, but to the public also, I feel bound to go over the grounds of discussion, and more at large than I should think necessary or useful in a case of ordinary importance.

I shall, however, pass over one branch of the case without remark, namely, that which relates to the ancient title of Harvard College; because I am of opinion, that there has been no legal or equitable transfer of this title to the plaintiffs. It is admitted that there has been no legal assignment from the college, and it appears to me equally clear, that nothing has been shown, that can amount to an assignment in equity. The plaintiffs contend, that by the payment of the annuity of 200*l.* to the college, they became purchasers of the right to the ferry; that an agreement on the part of the college to assign, may be presumed; and that in equity, an agreement to assign is equivalent to an actual assignment. But I think the basis of this argument wholly fails, because I cannot perceive that the payment of the annuity, under the circumstances of the case, has any tendency to prove a purchase of the college right. This annuity was paid in pursuance of an express provision in the plaintiffs' act of incorporation. It was the price paid for their charter; and which was to be reimbursed to them by the tolls. The annuity therefore has been eventually paid by the public; and the case, in my opinion, stands on the same footing as it would, provided the annuity had been made payable into the public treasury, and the government had made compensation to the college. If, therefore, there was a purchase of the college rights, the government, and not the plaintiffs, must be regarded as the purchasers. I cannot however view the transaction in the light of a purchase; the intention unquestionably was to extinguish the right of ferry, and to provide an equivalent; which I think is apparent from the language of the plaintiffs' act of incorporation. For the annuity to the college was not to cease at the expiration of the plaintiffs' charter; but the bridge was then to revert to the commonwealth, "saving to the college a reasonable and annual compensation for the annual income of the ferry which they might have received had not such bridge been erected." So that it is clear, I think, that the right of ferry was intended to be extinguished, and in no event to be revived. And it was accordingly extinguished by the acquiescence of the college. That it was so considered at the time by the plaintiffs themselves, I can have little doubt; otherwise it

would be difficult to account for their neglecting to require from the college a transfer of their franchise. But however this may be, I am clearly of opinion that the plaintiffs have derived no right or title from the college. I consider then the plaintiffs' rights, whatever they may be, as exclusively derived from the grants of government under the acts of 1784, *c.* 53, and of 1791, *c.* 62, and the case, in my opinion, altogether depends on the true construction of these acts.

The rule of construction as to royal grants seems to be perfectly well settled, as laid down by Blackstone, 2 Com. 347. When they are made at the suit of the grantee, they shall be taken most beneficially for the king; contrary to the grants of common persons. Thus if the king grants lands to one and his heirs male, this is merely void; for it is not an estate tail, as there are no words of procreation, &c. and it is not a fee simple, because it may reasonably be presumed that the king only intended to give an estate tail. So if the king makes a grant of lands and the mines therein contained, and royal mines are found therein, they shall not pass. And so if the king grants lands or a rent, and limits no particular estate in the gift, the grant is void, and the patentee has not an estate for life, nor even an estate at will.

The reason given is, that in grants proceeding from the application of the subject, the grantees ought to know what they ask, and if that does not appear, nothing shall pass from the king, by reason of the uncertainty. Bac. *Prerog. F.* 2.

So also if the king grants the right to seize and bring in for adjudication all ships of the enemy, yet this does not deprive the king of the power afterwards to except certain ships or particular classes of the enemy's ships. For it does not bind the crown in its power of qualifying the right granted, by subsequent modifications which the public good may require. For the general presumption is, says Lord *Stowell*, that the government does not mean to divest itself of this universal attribute of sovereignty, unless it is clearly and unequivocally expressed. And again, Lord *Stowell* remarks, "against an individual it is presumed, that he meant to convey a benefit with the utmost liberality that his words will bear. It is indifferent to the public

in which person an interest remains. With regard to the grant of the sovereign it is far otherwise. It is not held by the sovereign himself as private property; and no alienation shall be presumed, except that which is clearly and indisputably expressed." *The Elsebe*, 5 Rob. Adm. Rep. 163.

I am not aware of any good reason why the same general rule of construction should not be applied to grants from the legislature, especially when they relate to objects connected with the public interest or convenience. I confess, however, that I am not prepared to adopt all the English decisions on this point; some of which (and particularly the case cited as reported by Sir John Davies) appear to me to have pushed the privilege of the royal prerogative to an extent inconsistent with the principles of impartial justice. But in doubtful cases, it seems to me a sound and wholesome rule of construction, to interpret public grants most favourably to the public interest, and that they are not to be enlarged by doubtful implications. It is said that all the prerogatives of the crown must be for the advantage and good of the people, otherwise they ought not to be allowed by the law. Moore, 672. Whether this be the correct theory of the British government or not, it is certain that under our form of government, every branch of the sovereign power is to be exercised for the benefit, accommodation and happiness of the people. When, therefore, the legislature makes a grant of a public franchise, it is not to be extended by construction beyond its clear and obvious meaning; more especially when the question of interpretation relates to exclusive privileges, which all, more or less, tend to monopolies; though some are very properly allowed, for the encouragement of invention and enterprise. If this rule of construction be not observed, the hands of the legislature may be tied against their will, and they may be injuriously restrained in the exercise of the important power and duty of providing for the public welfare.

There are some legislative grants, no doubt, that may admit a different rule of construction, such as grants of land on valuable consideration and the like. It is said that when the king's grants are upon valuable consideration, they shall be construed favourably for the patentee for the honour of the king. Bac.

Prerog. F. 2. But to bring a grant within this exception to the general rule of construction, the grantee must show a consideration in some measure adequate, as well as valuable.

I proceed now to consider what, according to these established principles, is the true construction of the act of 1784, *c.* 53, and that of the additional act of 1791, *c.* 62.

It has been denied by the defendants' counsel, that the latter act or grant was accepted by the corporation; but there was an express acceptance before the expiration of the first grant; and I see no reason why this acceptance was not in season. But without that, the previous acts of the corporation are sufficient to authorize the Court to presume an acceptance. Grants beneficial to corporations may be presumed to be accepted, as well as grants to individuals, and an express acceptance is not necessary. *Bank of United States* v. *Dandridge*, 12 Wheat. 70.

To return then to the construction of these acts. In the preamble of the first act it is recited, that the erecting of a bridge over Charles river, in the place where the ferry between Boston and Charlestown was then kept, would be of great public utility, and that Thomas Russell esquire and others had petitioned the court for an act of incorporation to empower them to build said bridge. In the enacting part of the act the petitioners are accordingly incorporated, and a toll is granted and established for the purpose of reimbursing the corporation for the expenses of building and supporting the bridge. This grant of toll, taken in connexion with the preamble, without doubt authorized the corporation to erect a bridge at the place designated. And this certainly is all that is expressly granted by the act of incorporation. But the plaintiffs' counsel contend, that from the nature of the grant, there was an implied covenant on the part of the government, that it would do nothing whereby any of the travel over the plaintiffs' bridge should be diverted; or at least, that it should not be done without compensation. I cannot, however, perceive any thing in the nature or language of the grant, or in the existing circumstances at the time of the grant, from which such a covenant can be implied. On the contrary all that appears tends to repel such an implication.

This claim of an exclusive right was first advanced by the plaintiffs at the time when the proprietors of West Boston bridge were incorporated, and was repelled by the committee to whom the subject was referred; and the report of the committee was sanctioned by the legislature. The additional grant was then made to the plaintiffs, which was considered by the legislature as a donation for the encouragement of enterprise; and it is so expressed in the grant. It is clear, therefore, that the legislature did not intend to grant the exclusive privilege now claimed, and it is equally clear that this was known by the plaintiffs. They were at liberty to accept or reject the grant at their option, but when they accepted it, they must be considered as tacitly agreeing to the terms upon which it was offered. If then there were any doubts as to the construction of the first grant, which however I cannot perceive, there is none, as it seems to me, in relation to the additional grant, upon which alone the plaintiffs must rest their claim; the first grant having expired by its own limitation, before the erection of the bridge complained of. The intention of the legislature in making this latter grant is clear and manifest; and to imply a covenant on their part in direct opposition to their declared intention, would be to make rather than to expound a contract.

The next question to be considered is, whether there is, in the grant to the defendants, any thing inconsistent with the prior grants to the plaintiffs: or whether the proceedings of the defendants, sanctioned as they are by the authority of the legislature, can be justified.

1. It is first objected, that this grant to the defendants is inconsistent with the tenth article of the declaration of rights; and several cases have been cited in support of this objection. The principal one is that of *Gardner* v. *The Village of Newburgh*, 2 Johns. Ch. R. 162. In that case the defendants had diverted the water of a stream flowing through and over the plaintiff's land, being authorized so to do by an act of the legislature, in which there was no provision for compensation to the plaintiff, and it was decided that the act, for that defect, was not binding. But the grounds upon which that case was decided, wholly fail in the case under consideration. The chancellor says, "that a

right to a stream of water is as sacred as a right to the soil over which it flows. *It is a part of the freehold*, of which no man can be disseised but by lawful judgment of his peers or by due process of law." And on this principle that case was decided; a principle upon which the present case certainly cannot be maintained. For if the tolls taken by the defendants at their bridge were a part of the plaintiffs' freehold, then there is provision made in the defendants' charter for compensation to the plaintiffs, and they have no cause for complaint. But it cannot be maintained, that these tolls were ever a part of the plaintiffs' freehold, because it is clear, I think, that they never had any vested property in them. They had a vested property in their franchise, but not in the tolls, the fruits of their franchise, until they were actually received. If any one should be forcibly prevented from passing over the plaintiffs' bridge, it would be an injury for which an action on the case would lie, but not an action of trespass for taking or destroying their property. It would be like the case stated in the books, where one has a market and a toll, and another is coming with goods to the market, for which, if sold, toll would be due, and a third person hinders him from coming to the market; an action will lie for the lord of the market, on account of the possibility of damages. So it is laid down, that the stopping of beasts on their way to a market, to prevent their going there, is an act directly injurious to the owner's franchise; but he had no property in the beasts. It is said however, that if the stopping had not been *eo intuitu*, no action would have lain. *Tewkesbury* v. *Diston*, 6 East, 457.

So in the present case, the plaintiffs had no vested property in the tolls taken at the defendants' bridge, and therefore whatever damages the plaintiffs suffered by the diversion of travel from their bridge, the damages were consequential; and it was clearly settled in the cases of *Thurston* v. *Hancock*, 12 Mass. R. 220, and *Callender* v. *Marsh*, 1 Pick. 418, that consequential damage to property was not within the 10th article of the declaration of rights. In the latter case the plaintiff had sustained heavy damages by the alteration of an adjoining street; his use and enjoyment of his house had thereby been greatly impaired; yet, though that was a hard case, the Court held that the dam-

ages were consequential; and that such damages to property did not amount to taking it, so as to entitle the owner to compensation. The same principle is applicable to the present case. The plaintiffs' franchise has not been taken and appropriated to public uses, though to a certain extent they have been deprived of the beneficial use of it by the erection of the defendants' bridge. It is true a different doctrine is intimated in the case of *Chadwick* v. *The Proprietors of Haverhill Bridge*, as reported by *Dane*, Vol. 2, *c.* 67, *art.* 4, § 3. But this case was not decided by the Court, but by referees, and it does not appear that any objection was made to their report. And besides, provision was made in the defendants' charter for compensation to the owner of the ferry, so that the only questions in that case were as to the amount of compensation, and by whom it should be ascertained.

This objection therefore cannot be maintained on authority, and certainly it seems to me it cannot on principle, unless tolls and profits in expectancy can be considered as property within the meaning of the constitution. If such a doctrine can be maintained, then it must be admitted that the whole course of legislation in this and other states has been erroneous. Not only the acts authorizing the erection of West Boston bridge, the Canal bridge, and the Western avenue, are unconstitutional and void acts; but the acts establishing the Newburyport turnpike, and several other turnpikes, which divert travel from the plaintiffs' bridge, are all violations of their constitutional rights.

If the diverting of travel from the plaintiffs' bridge is taking their property, for which they are entitled to compensation by the constitution, then any change of roads or any other act, which would divert a single traveller, would be unconstitutional, except it was founded on the basis of compensation. If so, there is not a turnpike road in this or in any other state, which can be supported; for in none of the acts of this description has there been any provision for compensation for damages arising from diverting the travel from existing roads. And it appears to me, that a trader or innholder has as good a right to be protected in the enjoyment of the profits of his store or inn, as the plaintiffs have to be protected in the enjoyment of their tolls.

But these are all cases of consequential damages, for which the law provides no compensation; and the plaintiffs' case cannot, I think, be placed on any other or better footing.

The next question to be considered is, whether the grant to the defendants is void, as being in contravention of the constitution of the United States.

This question depends altogether on the construction of the plaintiffs' grant, and I have already anticipated almost every remark I proposed to make on this point. Without doubt the grant to the plaintiffs was a valid contract; and if the construction given to it by the plaintiffs' counsel is the true construction, then I admit that the obligation of it is impaired by the defendants' grant. But for the reasons already given, I do not feel at liberty to adopt this construction. For if I were rather inclined to think it correct, still, if it were a doubtful matter, I should consider myself bound to reject it. Nothing but the clearest conviction of my own mind would induce me to declare the act of the legislature unconstitutional; and although I do not question the power of the Court to make such a declaration, yet it never should be made but in cases which are clear and manifest to all intelligent minds. The acts of the legislature must be presumed to be constitutional, unless the contrary can be made very clearly to appear. Now the construction contended for by the plaintiffs' counsel is very far from being thus clear; on the contrary, I can find nothing in the case to support it. I do not rest my opinion on this point wholly on the rule, that legislative grants or donations are to be construed favourably for the public interest; for upon no rule of construction can the covenant set up by the plaintiffs be implied. All grants are to be construed according to the intention of the parties; and the intention in this case appears to me very clear. When the plaintiffs first advanced their present claim, it was rejected by the legislature. This claim was then founded on the first grant, and it was then that the grant under which the plaintiffs now claim was made. It was then known to the plaintiffs, that the legislature did not intend to grant the exclusive privileges now set up; and they must be presumed to have accepted the grant upon the terms offered. If these terms had not been satisfac-

tory, they should have rejected the additional grant, and vindicated their rights at that time. But they acquiesced, and afterwards, when the legislature approached them much nearer by the grant of the Canal bridge, they still acquiesced; so that the intention of the parties appears as clearly, as if it were expressly declared in the words of the grant. The construction therefore now contended for is opposed to the understanding of the parties at the time of the grant; and it is unreasonable, if adopted without qualification, as being opposed also to the public interest. For if the legislature were bound for seventy years, so that they could not provide for the public accommodation, without making compensation to the plaintiffs, the public might materially suffer, and the grant would partake too much of the nature of a monopoly.

Suppose the government, at the time of the grant, had a large establishment in Charlestown, occasioning much travel between that place and the capital, could it not be discontinued without compensation to the plaintiffs? Or suppose some of the roads leading to the plaintiffs' bridge at the time of the grant, could afterwards be turned in another direction, to the great accommodation of the public travel (as they in fact have been), could they not be so turned, or new roads opened, without infringing the plaintiffs' rights? It seems to me extravagant to hold that they could not; yet this is the necessary consequence of the principle now contended for. And this restraint is to be imposed on the legislature, not from any words in the grant manifesting their intention thus to bind themselves, but expressly against their declared intention at the time of the grant. Now the reverse of this, I think, is implied in the terms of the grant; the public accommodation was the declared object of the grant; it may therefore be implied very fairly, that the public were at all events to be accommodated; and if, from the increase of population or business, additional accommodation should become necessary, it was to be supplied.

This rule of construction is fully supported by the cases of *Prince* v. *Lewis*, 5 Barnw. & Cresw. 363, and of *Mosley* v. *Walker*, 7 Barnw. & Cresw. 54. In the former case the plaintiff had a grant of a market for the sale of fruits, vegeta-

bles, &c. within specified limits, and the complaint was, that the defendant had sold fruits &c. in the neighbourhood of the market. The plaintiff recovered a verdict, but the court held, that the action would not lie, it appearing that there was not sufficient accommodation for the public in the market, a part of the space having been diverted to other purposes. In the case of *Mosley* v. *Walker*, *Bayley* J. says, "I take it to be implied in the terms in which a market is granted, that the grantee, if he confine it to particular parts of the town, shall fix it in such parts as will yield to the public reasonable accommodation; in order that the market, which was originally granted for the benefit of the public, as well as for the benefit of the grantee, may be effectually held."

It was upon this principle that the legislature proceeded, in authorizing the erection of the defendants' bridge, having decided, upon a full hearing of all parties interested, that public necessity and convenience required the additional accommodation prayed for; and on this point their decision is conclusive.

It is true, the plaintiffs offered to provide the most ample accommodation, by constructing a circular draw, and a spur bridge on the Boston side of the river, to facilitate travel to and from the westerly part of Boston, and even to erect a new bridge. But however reasonable this offer appears to be, (and I confess that to me it appears exceedingly reasonable,) yet I take it the legislature were the exclusive judges on this point also. They were not compellable to enter into a new contract, or to enlarge or modify their former grant. They were to determine whether the public were or were not sufficiently accommodated; and if they were not, in what manner, and by whom, the additional accommodation should be supplied. The Court have no right to inquire into these matters, and we cannot know judicially to what extent the public were incommoded, and how pressing was the necessity for a new bridge; so that unless we determine that no inconvenience, however great, would authorize the legislature to interpose as they did, we cannot impeach their grant to the defendants as an unconstitutional act.

The view I have thus taken of this part of the case does not appear to me inconsistent with the current of the authorities cited by the plaintiffs' counsel in support of their exclusive claims. Most of the cases relate to ancient rights to ferries and markets, founded on titles by prescription. Now when a party can show that he has claimed and enjoyed an exclusive privilege from time immemorial, a grant in his favour will be presumed co-extensive with the enjoyment. These cases therefore will furnish no rule of construction as to actual grants, which are to be interpreted according to the terms of them. But even in some of the cases founded on prescriptive titles, the parties were not allowed unlimited exclusive privileges, although they had been enjoyed from time immemorial. They were restrained in favour of the public interest and convenience. In the case cited from Hardres, a new ferry was set up at the distance of three quarters of a mile from an ancient ferry, and it was held that it was no injury to the lawful rights of the owner of the ancient ferry. In the case of *Tripp* v. *Frank*, 4 T. R. 666, the plaintiff proved a title by prescription to a ferry from Kingston upon Hull to Barton, and that the defendants had at different times carried over persons from Kingston upon Hull to Barrow, two miles below Barton. A verdict was returned for the plaintiff, but the court held that the action could not be maintained; yet it is obvious that the plaintiff had suffered by the diminution of his tolls; but it was *damnum absque injuriâ*. The court remark, "that it is absurd to say that no person shall be permitted to go to another place on the Humber than that to which the plaintiff chooses to carry him."

The decisions in these cases and in the cases of *Prince* v. *Lewis*, and *Mosley* v. *Walker*, before referred to, are, in my opinion, fully supported by well established principles, and are strongly opposed to the whole doctrine on which the plaintiffs rest their case.

Upon the whole, I am of opinion that the grant to the defendants is a valid grant, and that the acts and proceedings under it are no infringements of the plaintiffs' rights; it having been decided by competent authority, that the erection of a new bridge was required by public convenience and necessity.

I am aware of the hardship of the case in relation to some of the plaintiffs; and I am, I trust, fully sensible of the importance of preserving public faith, and protecting private property; but the public interest, accommodation and convenience, are likewise to be guarded; and we must respect the constitutional rights and powers of the legislature, preserving also a reasonable confidence in their wisdom and integrity. Their doings are not to be set aside, unless it can be made clearly to appear that they have exceeded their constitutional powers.

For these reasons I am of opinion that the plaintiffs are not entitled to the relief prayed for, and that the bill should be dismissed.

Putnam J. It is admitted that the act of March 9, 1785, (*St.* 1784, *c.* 53,) granting to Thomas Russell and others a right to build a bridge over Charles river, and to have the toll for forty years, and the act of March 9, 1792, (*St.* 1791, *c.* 62,) extending the term for taking toll to seventy years, are to be considered as contracts, within the meaning of the constitution of the United States.

The act for the incorporation of the proprietors of the Warren bridge, (*St.* 1827, *c.* 127,) was passed on the 12th of March 1828.

The general questions for consideration are, whether the last act impaired the contracts first mentioned, and so was contrary to the constitution of the United States: and whether it was an appropriation of private property for public uses against the consent of the owners and without compensation, and so was contrary to the constitution of Massachusetts.

I think that both questions should be determined in the affirmative.

I propose to maintain, 1. That the President and Fellows of Harvard College, on the 9th of March 1785, were seised in fee of the franchise of the ferry between Charlestown and Boston, under the grants of the colonial government.

2. That the college, for valuable consideration paid by Mr. Russell and his associates, consented that they should have the ferry during the continuance of their charter.

3. That no other ferry could be lawfully erected by the state, or by individuals, so near to the old ferry as to impair its profits or draw away its custom.

4. That the plaintiffs, having acquired the right of the college as above mentioned, did, in virtue of the charter granted to them by the legislature, become seised of an exclusive franchise, which was as extensive as the owners of the ferry had enjoyed, for the transportation over Charles river, between Boston and Charlestown, over their bridge; so that a new ferry or bridge, which would have been a nuisance to the old ferry, would also be a nuisance to the old bridge.

5. That if the charter to the plaintiffs, to erect a toll-bridge, is to be construed without reference to the ferry, it would be a grant of an exclusive privilege or right to have toll for transportation, as extensive as if it had been a grant of a ferry: and also, that it contained an implied covenant or engagement on the part of the state, not to grant another bridge so near as to draw away the toll from the old one.

6. I shall consider the operation of the new bridge upon the old one, and draw the consequences which I think the constitution requires, upon the whole matter.

I extend to the legislature all the respect which should be required from a member of the judicial department. Their acts are presumed to have proceeded from good motives, and a sense of duty imposed by the constitution and the laws. But in speaking of an act which I disapprove, I cannot use words of commendation. I desire it to be understood however, that the opinion I am now to pronounce, is formed with all proper deference for a co-ordinate department of the government.

1. In the first place I am to show that the college owned the ferry.

It appears that in 1640 the general court granted *the ferry* between Boston and Charlestown to the college. It was objected that this grant was made before the college was incorporated, and so was void for the want of a party legally authorized to take and hold as a grantee. If that were so, it would not diminish the liberal intention of the grantor or donor, and would aid in the construction of the subsequent grants to that deserv-

edly favoured institution. It was incorporated in 1650. And in that year the general court ordered, that the president, in behalf and behoof of the college, might *dispose of* the Charlestown ferry by lease *or otherwise*, making the best and most advantage thereof to his own content. In the same ordinance the ferry-rent is spoken of as *belonging to the college*. Four years afterwards the general court speak of "the profit of the ferry, *formerly granted* to the college, which shall be *continued*." and in 9 Anne, when a complaint was made of neglect of due attendance at the ferry, an act passed, reciting, "that the treasurer of the college had attended," and that "the profits and revenues of the ferry had been granted to Harvard College in Cambridge," and "they had seen the lease made by him of the ferry for several years yet to come." In this connexion, considering that the state had for one hundred and forty-five years permitted the college, under these grants, original and confirmatory, to take the profits for their own use, it cannot (as it seems to me) be doubted, that the college was seised of the franchise as of fee when the act of 1784 was passed.

It was contended however, that notwithstanding the grant of 1640, the general court, in 1644, exempted the magistrates from the payment of ferriage, which would be an act implying a right to the franchise itself. But the exception in the ordinance carries an answer to the argument. The magistrates were not to pay, "*except at such ferries as were appropriated to any* or rented out, and were out of the country's hands." In such cases the country (or general court) were to pay for them. That was exactly the case in regard to Charlestown ferry. It was appropriated to the use of the college; it was out of the country's hands, and in the hands of the college. The magistrates were to pass without paying the ferriage themselves, but the government were to pay it for them.

Upon this part of the case it seems to me very clear, that the state had made a permanent grant of the franchise to the college for the furtherance of good learning. It was a wise and munificent exercise of their power. The grants were accepted, and the duties which they imposed were performed by the college.

2. The college, for valuable consideration paid by Mr. Rus-

sell and his associates, consented that they should have the ferry during the continuance of their charter.

This fact is proved by circumstances which could not have taken place, unless such consent had been given. The plaintiffs built their bridge over the ferry-ways, and ever since they have continued to pay to the college 200*l.* a year for their right. The college discontinued their boats, and the plaintiffs have taken the toll for transportation. The college have received the annuity, in lieu of the tolls which they had before received for their own use for nearly a century and an half. Surely the college could not maintain an action against the proprietors of Charles river bridge for a disturbance of their ferry, because the jury would be bound, from these facts, to find that they had consented that the plaintiffs should have it during their charter. 2 Wms. Saund. 175 *b*. The assent of the college, whether it be in the nature of a grant, discontinuance, surrender, lease or license to use the franchise of the ferry, should be construed to enure in the most beneficial manner for the plaintiffs, who paid a valuable consideration for it. The legislature recognise the agreement in the charter to the plaintiffs. The plaintiffs were grantees, or, at least, licensees of the college.

3. I now propose to show, that no other ferry could be lawfully erected by the state, or by individuals, so near to the old ferry, as to draw away its custom.

This involves the consideration of the rights which belong to a ferry. How far on each side does the franchise extend?

On the part of the defendants it is contended, that the right is confined to the ferry-ways on each side. And we are referred to Sav. 14, for the authority to support that position. It is said, that a ferry is in respect of the landing-place, and not of the water; the water may be in one, the ferry in another, and in every ferry the land on both sides of the water ought to be in the owner of the ferry; otherwise he cannot land on the other part. 13 Vin. 208, *tit. Ferry, Ipswich* v. *Brown*. The last sentence is explanatory of the case. The matter under consideration was not how far on each side the franchise extended; the point of the decision was, that there must be a right of landing necessarily included in the franchise, or it would not come within the de-

scription of a ferry. In Com. Dig. *Piscary, B*, the case is stated thus :— "He who has the privilege of a ferry, ought to have the soil on both sides of the water, for he cannot land upon the soil of another without his assent." Now that seems to be an obvious truth. There must be a right of landing. It is not necessary however that the owner of a ferry should have a fee simple in the soil. A permission or license of the owner to land would be sufficient. *The King* v. *Nicholson*, 12 East, 333.* But there is no legal ground to maintain that the extent of the franchise is to be limited to the ferry-ways.

The law was clearly held otherwise in England for centuries before the settlement of this country. It was brought hither by our fathers, and has been recognised by the eminent jurists of our own country. I deem it important to demonstrate this part of the case, and shall therefore make free citations from the books to prove it.

It is said by *Paston* J. in 22 *H.* 6, 14, *pl.* 23, that "if I have an ancient ferry in a ville, and another sets up another ferry upon the same river *near to my ferry*, so that the profits of my ferry are impaired, I shall have an action of the case against him." And the reason is given by *Newton*—"for you are bound to sustain the ferry, and serve and repair it for the use of the people, under penalty of grievous amercement." *S. C.* 16 Vin. 30, *tit. Nusance, H. pl.* 25 ; *S. C.* 2 Roll. Abr. 140, *tit. Nusance, pl.* 4 ; where *the second ferry is called a nuisance* to the first.

Bac. *Prerogative, F*, 1. "If the king grants a fair or market to one person and afterwards grants another to another person to the prejudice of the first, the second grant is void." The king will permit the party aggrieved, *as a matter of right*, to use

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* Since this opinion was delivered, I have seen the case of *Peter* v. *Kendall et al.* 6 Barnw. & Cresw. 703, where there was a demise of a ferry by parol, at an annual rent, and afterward an agreement by parol, that the tenant should become servant to the lessor and should account for the tolls; and it was held, that there was a *surrender* of the tenant's interest by operation of law. And the doctrine that the owner of the ferry must own the soil on each side, is expressly denied. The court held it sufficient if he had a right to use the land for the purposes of a ferry.

his name for the repeal of the second grant, which was prejudicial to the first. *Sir Oliver Butler's Case*, 2 Ventr. 344 ; *S. C.* 3 Lev. 221 ; *Brewster* v. *Weld*, 6 Mod. 229. Same law in 3 Bl. Com. 218. That distinguished commentator expresses himself thus ; —"If a ferry is erected on a river, so near to another ancient ferry as to draw away its custom, it is a nuisance to the owner of the old one." Same law, Fitzh. N. B. 184, note *a ;* Bull. N. P. 76 ; *S. P.* Lord Hale's Treatise, *De Portibus Maris*, *c.* 5, *p.* 59.

Blissett v. *Hart*, Willes, 512, was an action of the case by the owner of an ancient ferry, against one who had set up another near. It is there laid down, that the owner may have his remedy for the injury by an assise of nuisance, or an action upon the case. It is a franchise which cannot be erected without license from the crown, and when one is erected, another cannot be erected without a writ of *ad quod damnum.*

16 Vin. 26, *tit. Nusance, G, pl.* 2. But if such grant should be made without that clause, and it should be found to the damage of the king or of the subject, it shall be avoided.

We have no process of *ad quod damnum*, but it is believed that the constitutional provisions and the principles of the common law, afford protection to the property of the people here, equivalent to that which is given by the writ of *ad quod damnum* in England.

A ferry, says Mr. *Dane, vol.* 2, *p.* 683, "forms a part of a public passage or highway, wherever rivers or waters are to be passed in boats. They therefore, who have a ferry, must be bound in a proper manner to keep it up ; to have suitable ferry-ways, boats and attendants, at all seasonable times. The natural consequence of this duty, enjoined by law, is, that the keepers of the ferry must have a reasonable compensation for their time and expenses, fixed by law, and legally secured to them. *In this way, a ferry becomes property*, an incorporeal hereditament, the owners of which, for the public convenience, being obliged by law to perform certain public services, must, as a reasonable equivalent, *be protected in this property.*"

The owner may prove his title by grant, or by prescription, which supposes such a grant to be made.

The case of *Chadwick* v. *Proprietors of Haverhill Bridge* was settled upon these principles. It was decided in this Court in 1798. 2 Dane, 686. The plaintiff declared in an action upon the case against the defendants, for destroying his ferry by the building of a *bridge* near to and within forty rods of his ferry. The defendants justified under an act of the legislature authorizing them to build the bridge; and this Court was of opinion, "that the act *did not*, and perhaps *could not*, deprive the plaintiff of his common law right to try his title and damages by a jury in a civil action. How could the Court have otherwise determined, without disregarding the provisions of the constitution, which declares that the trial by jury shall be held sacred?

I have examined the record and papers in that case. The declaration was drawn by *Parsons*. The original remains on file in his hand-writing. I mention this circumstance to show that it was a case which received his particular attention. It states, "that the plaintiff, on the 1st of August 1794, and long before, was and ever since has been, and now is seised in his own demesne as of fee and right, of and in a certain ferry over Merrimac river, known by the name of Chadwick's Ferry, for the transportation in boats, of persons, carriages and beasts from Bradford to Haverhill, and from Haverhill to Bradford, with a right to receive toll for the said transportation; yet the proprietors, not ignorant, &c. but intending to injure the said Chadwick in the enjoyment of his said franchise and deprive him of the toll and profits accruing therefrom, on the 1st of August aforesaid, erected a bridge over the said river, near to and within forty rods of the said Chadwick's ferry aforesaid, extending from Bradford to Haverhill, from the banks of said river in Bradford aforesaid, and over the said river to the banks thereof in Haverhill, for the passage of any persons, their carriages and beasts from Bradford to Haverhill, and from Haverhill to Bradford, for a toll to be paid to the said proprietors for such passage, and the said bridge have kept up from that time to the present time, and during the same time have permitted sundry persons, with their carriages and beasts, to pass the same bridge, and have received divers sums

of money as toll therefor, to the great prejudice and detriment of the said Chadwick, and the said Chadwick hath thereby lost, during the time aforesaid, all toll and profit arising from his said ferry."

The plaintiff in that case proved a prescriptive right to the ferry. The depositions are on file. In June term 1797 the action was referred specially. Mr. Dane (the venerable author of the Abridgment of American Law, who was then in full practice at the Essex bar) was the chairman of the referees. The rule was drawn up by *Sullivan* (who was attorney general and of counsel for the proprietors), and amended by *Parsons*, and signed by both, giving the referees authority to find a sum in gross for the damages, if they should find that the plaintiff had a right to recover. The award, dated November 14, 1798, is in the hand-writing of Mr. Dane, in which the referees say that they, "having found that the said Chadwick had a right to recover damages, do report that he recover 1110 dollars, being a sum in gross," &c. Chief Justice *Francis Dana* was present with the whole court, when the report was accepted. His associates were *Paine*, *Bradbury*, *Cushing* and *Dawes*.

The act of incorporation of the proprietors of Haverhill bridge, passed March 22, 1793, (Special Laws, *vol.* 1, *p.* 437,) provided that within one year after the bridge should be opened for passengers, the proprietors should pay Samuel Chadwick such sum or sums of money as should be awarded to him by three indifferent men mutually chosen by the parties, as a full compensation for any injury sustained by him by the erecting said bridge; and in case of the refusal of either of the parties to appoint such referees, the judges of the Court of Common Pleas for the county of Essex should ascertain and adjudge said compensation, after due notice to all concerned. But Chadwick did not choose to abide by that mode of compensation, and commenced his action at law; and the Court held, that the act of the legislature did not take away his right to a trial by jury.

I consider this to be a case of great importance, notwithstanding the judgment was rendered upon a report of referees. It came under the consideration of a court very

learned, especially in the common law. The most eminent counsel were engaged on each side. The defendants were a powerful corporation, claiming, but finding no shelter, under an act of the legislature, which had taken the property of the plaintiff for public uses, without providing for him a constitutional trial by jury. I do not question the right of parties to submit the law as well as the fact to arbitrators, who, being judges of the parties' own choosing, have power to decide definitively. But this was no ordinary case or arbitration. It must have been broken before the Court, or they would not have expressed the opinion which they did. It may not, under the circumstances, be considered as *binding* upon the Court. But if it is considered merely as the award of the American *Coke*, upon a question of legal right, it is to be treated with great respect. Mr. Dane (*ubi sup.*), says that they reported for the plaintiff, on the ground that he had such a right in the ferry as he had declared for.

I hold it upon the authorities of the law to be clear, that the franchise of a ferry is not confined to the ferry-ways, but that it has an exclusive right of transportation of such extent on each side, as to prevent near and injurious competition. If, therefore, the Charlestown ferry had been continued, and the owners of it had sued the proprietors of Warren bridge, the case would be like the case of *Chadwick* v. *Proprietors of Haverhill Bridge*, with this exception, that Chadwick's ferry was not so near to Haverhill bridge, as the Warren bridge is to the Charlestown ferry-ways. If a new ferry had been set up where the Warren bridge is, it would in legal contemplation be clearly a nuisance to the old ferry.

4. I proceed to show that the plaintiffs, having acquired the rights of the college as aforesaid, did, in virtue of the charter made to them, become seised of a franchise to have the toll for transportation over their bridge, as extensive as the college had enjoyed for the transportation in boats.

This contract must be construed according to the intent of the parties, " as it may be inferred from the whole expressions and the nature of the occasion to which it is applied." 1 Evans's Poth. 59, *in notis*.

The act or contract is very inartificially drawn. It contains no express enacting clause authorizing Mr. Russell and his associates to build the bridge, and their right to do so is to be inferred only by implication. And if the doctrine is correct, that nothing is to be taken by implication in the grants of the state, as it has been said in regard to the grants of the king, the proprietors could not defend themselves against an indictment for nuisance.

Thus in a case cited by the defendants from Davies 157, it was agreed, that where the king granted to Sir Randall M'Donell all the territory adjoining to the river Banne, and *all fisheries* within that territory, "*exceptis tribus partibus piscariæ de Banne,*" *that the fourth part of* this fishery should not pass by the grant; for (say the court) "*the king's grant shall pass nothing by implication.*"

My brethren, I believe, are not prepared to adopt that position. It must follow from the rejection of it, that the king's grants, or grants of the state, are to be construed with all such implications as are necessary to carry their manifest intent into effect.

I hold, that even in the construction of the king's grant, the rule, *id certum est quod certum reddi potest,* applies as much as it does in the grants of individuals. And that where the king grants for a *valuable consideration, it is to be construed more favourably for the patentee,* than for *the king.* I suppose it will not be contended that the grants of the legislature are to be construed more favourably for the grantor, than the grants of the king would be.

In *The Lord Chandos's Case,* 6 Co. 55, it was held, that although the king hath mistaken the law or the fact, in case the same were no part of the consideration, the grant shall not be avoided, because the party was in no fault. By a grant of the manor, without a word of the reversion, the reversion shall pass, although the king grants it as in *possession.*

Again, in *Whistler's Case,* 10 Co. 65; "such construction as will make the true intention of the king expressed in his charter take effect, is for the king's honour, and stands with the rules of law."

17 Vin. 153, *tit. Prerogative, O. c, pl.* 1. If two constructions be made, one to make the grant void, and the other good, then for the honour of the king and the benefit of the subject, such construction shall be made that the grant shall be good.

Again, in *Molyn's Case*, 6 Co. 6, the rule is mentioned, "to construe the king's grant beneficially for his honour and the relief of the subject, and not to make any *strict or literal construction* in subversion of such grants."

Vin. *(ubi sup.) pl.* 4, referring to 2 Inst. 496. *The king's patents for liberties, lands, &c. shall have no strict or narrow interpretation for the overthrowing of them,* but *secundum earundem plenitudinem judicentur, viz.* to have a liberal and favourable construction for the making of them available in law, *usque ad plenitudinem*, for the honour of the king, *viz. as fully and beneficially as the law was taken at the time when they were made.*

The parliament of England, sensible of the great oppression which would fall upon the subjects, by a narrow construction of the grants of the sovereign, in the time of Queen Elizabeth *(43 Eliz.* 1,) enacted, "that letters patents of all grants made by the queen, should be expounded most beneficially for the patentees, any mis-naming, mis-recital, or non-recital notwithstanding."

Vin. *(ubi sup.) pl.* 13. "The construction made on grants of the crown is, that where *the intention is plain*, the words are taken *most favourably for* the subject."

Com. Dig. *Grant, G*, 5. "If the king's grant refers to another thing which is certain, it is sufficient; for *id certum est*, &c. though the reference be to a matter *in pais*."

In Plowd. 13. "If the king grants all such lands as came to him by attainder, this grant comprehends no certainty; yet it was held good, because *by circumstances it may be reduced to a certainty.*" And it is said that the "same law is in cases of common persons." So in *p.* 12. "If the king grants over certain lands which came to his hands before, and further grants to the grantee such liberties, privileges, &c. as he had who was last seised of the lands, where the king knows not the certainty of the liberties and privileges, yet this grant is good enough,

and the patentee may inquire what liberties and privileges the other had before, and the same he shall use and enjoy, and yet they were not certainly expressed, but were incertain at the time of the grant: But for as much as this incertainty may be reduced to a certainty by inquiry, or other circumstances, the grant is good."

Bac. Abr. *Prerog. F*, 2. "If the king's grant may be taken to two intents, one of which may be good and the other not, it shall be construed to such intent that the grant may take effect."

Bac. *Prerog. F*, 2. "When the king's grants are upon a valuable consideration, they shall be construed favourably for the patentee for the honour of the king."

17 Vin. 152, *Prerog. M c, pl.* 11. The service done to the realm is as good a consideration as if 500*l.* had been given for the land. Per the Lord Chancellor.

I will now proceed to inquire as to the facts and circumstances which attended the making of the grant or act of 1784.

The only communication with Boston was by the Charlestown and the Winnesimmet ferries, excepting the communication by Roxbury. Mr. Russell and his associates, in their petition to the legislature, explain their expectations if their petition should be granted. After speaking of the inconveniences of the transportation in boats, they say, that it had long been the wish of many to see a bridge erected across Charles river, in the place where the ferry between Boston and Charlestown was then kept. They take into consideration the great advantage which will arise, not only to the towns of Boston and Charlestown, but to all the country "to the *westward*, *northward*, and *eastward*, by the accomplishment of so desirable an object." And they were willing, if suitable encouragement should be given to them, to undertake the work at their own cost and charge, though the expense would be great. In other words, they propose to accommodate all who come from the *west*, from the *north* and from the *east*, with a bridge, being satisfied that the toll which such a travel would pay, would indemnify them for the hazard and expense. They expressly refer to the ferry, and propose to put their bridge in its place, for the public ac-

commodation, as well as for their own emolument. The legislature granted their petition. The act is an echo of it. It is entitled, " An act for incorporating certain persons for the purpose of building a bridge over Charles river, between Boston and Charlestown, and supporting the same during the term of forty years." Then they recite, that whereas the erecting of a bridge over Charles river, in the place where the *ferry* was then kept, &c. They proceed to make the petitioners a corporation and to grant a toll for the sole benefit of the proprietors of the bridge for forty years, commencing on the day when the bridge should be opened for passengers.

Various rights and interests were to be provided for, before the project of the petitioners could be carried into effect. The President and Fellows of Harvard College were to be secured in the payment of the annuity for their right to the ferry, during the charter. The license of the government to obstruct, in some degree, the navigable waters, by the piers of the bridge, was to be obtained. The public accommodation was to be provided for by a bridge of such ample dimensions as the legislature should prescribe. And lastly, the petitioners were to be remunerated by the toll for their great expenditure of money and labour upon a then untried and hazardous enterprise. And besides, the college was to be exempted from the duty of keeping up their boats, while the bridge should be passable. For they could not lay down, any more than they could set up a ferry, without the consent of the legislature. *Paine* v. *Partridge*, 1 Salk. 12.

Now it is clear to my mind, that all these various rights and interests were intended to be provided for by the act of 1784. The state cannot be permitted to say, against the necessary inference of that act, that the petitioners were not licensed to build the bridge. They surely are not liable for a nuisance in the navigable waters of Charles river, nor could any indictment be maintained against the college for discontinuing their ferry under the agreement with the proprietors of the bridge. These were the expected consequences of the building of the bridge. And as little was it apprehended that the franchise in the bridge should be of less extent than the franchise

of the ferry, to which all the parties concerned in the act referred.

This grant was for a valuable consideration, rendered to the public, and (as we have seen) is to be construed favourably for the grantee.

If the grant had been made directly to the college, could it be supposed that their franchise, or right to toll, had been lessened, because the mode of transportation had been changed? Let us consider for a moment the nature of these franchises. They are included in the species of tolls, and among many (of which Lord *Coke* speaks in *Webb's Case*, 8 Co. 92,) are *pontage* and *passage*. "The latter," he says, "is properly a ferry for the passing of men and cattle over a water, for which the owner has a toll; the former is a toll for passage or carriage over a bridge." *S. P.* 13 *H.* 4, 14, and in the index to that vol. *verb. Grant;* 17 Vin. Abr. 88, *Prerogative, M, b, pl.* 18, 19; *Heddy* v. *Welhouse*, Moore, 474; *Smith* v. *Sheperd*, ibid. 574.

Now I think it was intended by all the parties named or concerned in the act of 1784, that the proprietors of the bridge should succeed the owners of the ferry, in the toll for the transportation of all which should come from the *east*, from the *west* and from the *north* to Charlestown, and go from thence to Boston, and back again. In other words, *pontage* was substituted for *passage* (or *ferriage*, as it is more frequently called), without any diminution of the extent of the franchise. It would seem therefore to follow, that a new ferry or bridge which would have been a nuisance to the old ferry, would also be a nuisance to the bridge, which took the place of the old ferry.

I have dwelt much upon this part of the case, because I think it has a strong tendency to show what were the intentions of all parties concerned or interested in the original contract or act of 1784.

It has been contended, that the right of the college in the ferry was surrendered to the state, and that it merged in the state, so that the grant of the charter for the bridge should be considered as altogether independent of the ferry, which had thus become extinct.

I have two answers to that argument. In the first place, that the right to the ferry did not merge in the state; and secondly, if it did, it does not affect the question, because a grant may refer to a thing, or to rights, privileges or liberties, which once existed, by inquiries, *even in pais*, just as well as it may to things, rights, &c. in existence.

As to the first point, it would seem to be a violent construction of the act of 1784, and of the circumstances which accompanied it, to make it a surrender of the ferry to the state. I admit that it was surrendered either to the state or to the proprietors of the bridge *during its charter*. If to the state, it was without consideration; if to the proprietors of the bridge, it was upon valuable consideration. Now I cannot but think it is more consonant to law and reason, that the party which paid the value, should have the right, than the party which paid nothing at all.

Suppose the ice and the tides should have carried away the bridge the next winter after it was completed; the proprietors would have had a right to continue the ferry during their term, and take the tolls, for they were liable to pay the annuity to the college during that time. And if at the end of the term, there should be no bridge remaining, *the college would have the ferry, without a new grant from the state*. The college had in effect surrendered or leased it to the proprietors *during the charter of the bridge*. They have never parted with their reversionary interest.

But secondly, if it did merge in the state, it would not affect my argument. It once existed, and as a matter of reference, to explain the meaning of the contract of 1785, it would have been just as good if it were merged, as if it were leased only for a term of years to come.

For example. On the 23d of November 1637, the general court "leased to Edward Converse the ferry between Boston and Charlestown, to have the sole transporting of passengers and cattle from one side to the other for three years." Now suppose the state, after the expiration of the lease, should have granted a toll bridge to be placed where the ferry was kept by Edward Converse, while he was lessee of the state, with all

the privileges in that lease contained; I think that lease would be taken into consideration, in ascertaining the privileges granted to the proprietors of the bridge, notwithstanding it had expired according to its own limitation.

It is said by *Popham* C. J., Cro. Eliz. 591, that where one hath a grant by prescription, whereto a toll hath usually been paid, which is afterwards forfeited to the king, and the king grants it *cum omnibus libertatibus ad feriam spectantibus*, by this grant the grantee shall have the toll, for toll was formerly belonging thereto; and therefore the king did not grant a new fair, but the ancient one.

In the case of the *Abbot of Strata Marcella*, 9 Co. 30; "When a charter has general reference to other charters, it is as much in law as if all the charters had been recited."

5. But I maintain, that if the charter to the plaintiffs to build a toll bridge, is to be construed without reference to the ferry, it contains a grant of an exclusive privilege or right to have toll for transportation, as extensive as if it had been a grant of a ferry; and that it contained an implied covenant or undertaking, on the part of the state, not to grant another bridge so near as to draw away the custom from the old one.

I maintain that the franchise in a toll bridge is analogous to the franchise of a ferry, and is no more to be confined to the width of the bridge, than a ferry is to be confined to its ways. I ask for a reason, why a different legal rule is to be applied to the franchise in a toll bridge, from that which we have seen is applied to a franchise in a ferry. The franchise consists in the emoluments to be derived from transportation. It is not enough to say that the one is by a bridge and the other is by a ferry. What reason can be given, why a man's property in a ferry should be protected from near and injurious competition, and his property in a bridge should be exposed to the nearest invader? I have heard none, and I think my learned brethren would have given one if there were a good one to give. They are both *publici juris*, and derivable from the grants of the state. Both are grounded upon tolls, for indemnity and income to the owners. The expenses of the bridge, and its accommodation of the public, are immensely greater than those of

the ferry. They are protected precisely by the same legal principles. *Eadem est ratio, eadem est lex.*

In *Chadwick's Case*, the bridge was just as much treated as a nuisance to his ferry, as if a new ferry had been set up where the bridge was placed. In its effect it was infinitely a greater injury. It destroyed the ferry. Why is it that a new bridge or new ferry is a nuisance to an old one? Because it diverts the travel and transportation, and so deprives the ancient bridge or ferry of the toll which it would otherwise have received.

The defendants must maintain, that the extent of the franchise is confined to the width of the bridge. My learned brethren, from whom I am compelled to dissent, must come to that conclusion. I have demonstrated, if any proposition can be demonstrated from the books of the law, that this limited construction is not to be applied to a ferry. I must admit, however, that if the extent of the franchise is so limited to the width of the bridge; if that was the real intent and meaning of the legislature and of the grantees; it would follow that the plaintiffs have no claim; their property has not been taken, the constitution has not been violated, and all the general principles to which I have adverted are misapplied. I believe my learned brethren who would maintain that the right is confined to the width of the bridge, do not consider *that* as a very clear proposition. The case certainly admits (to say no more of it) of another and enlarged construction. Upon this point then I refer again to the rules applicable to the construction of grants of the king. "If two constructions may be made, one to make the grant good, the other to make it void, then for the honour of the king and the benefit of the subject, such construction shall be made that the grant shall be good." The court are "to construe the king's grant most beneficially for the honour of the king, and for the relief of the subject, and not to make any strict or literal construction in subversion thereof." Now if the case be tried upon those principles, how will it stand?

The legislature, for a valuable consideration received by the public, in the bridge erected at immense expense and risk, grant to the meritorious and enterprising proprietors a toll for their own use, first for forty, and then for thirty years more.

But the state has a right indirectly to withdraw the transportation from it. Are these things consistent with the honour of the government and the safety of the people?

It would be in vain to tell the proprietors that their franchise remained, notwithstanding a new bridge had been placed in effect side by side, which should deprive the old bridge of its emoluments. Suppose, for example, a free bridge should be so placed by the side of the toll bridge—it would seem a mere mockery, to tell the proprietors that they might have all the toll which they could collect for the transportation over their bridge so long as their charter continued. The free bridge would as effectually destroy their franchise, as if an armed force were stationed to prevent any passing over it. Who does not see that their charter would be subverted by this construction? All must admit the fact which would result.

But the maxims of the common law should be applied to this subject. One shall not do indirectly, what he has no right to do directly.—Every grant shall carry with it all things which are necessary to the enjoyment of it. "*Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud.*" "*Quando aliquid conceditur, conceditur et id per quod pervenitur ad illud.*" "The king (said the excellent and independent Chief Justice *Gascoine*) cannot, by his charter, oust the common people of their inheritance which they have in the common law." 8 H. 4, 19.

It has not been contended that the legislature could, at their own will, revoke or repeal their own grant. Notwithstanding this is obviously clear, yet I cannot deny myself the pleasure of quoting a passage from an elaborate opinion for the whole court by *Story* J. upon this point, in *Terrett* v. *Taylor*, 9 Cranch, 52. "But (said the learned judge) that the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they may please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the

fundamental laws of every free government, upon the spirit and letter of the constitution of the United States, and upon the decisions of the most respectable judicial tribunals, in resisting such a doctrine."

This is the doctrine of the common law expressed in the language of the time. "If the king grant a ratification to an incumbent of a church, of which he has the right of presentment, and repeal this ratification, the revocation is void; for the king cannot (say the court 10 *H.* 4, *pl.* 10,) repeal that, nor a grant of pardon, nor a release, *et hujus modi.*"

Now I maintain, that if the state could not directly repeal their grant, they could not do that which in its operation and effect would be equivalent to a repeal of it. If this principle be not supported and followed out, we shall never have a remedy for any violation of contracts, or of the constitution. We shall never see an act reciting, that whereas the legislature did grant three acres of land or a toll for forty years, be it hereby enacted that the grantees shall have only one acre of land, or toll for thirty, or any less number of years. No legislator would vote for a thing of such naked deformity. But if the construction of the charter under consideration be limited to the width of the bridge, and a free bridge should be set up side by side, the effect would be, to repeal all the beneficial interest of the proprietors in their grant. Yet there would be no direct infringement of it in terms, for the free bridge which we have supposed, would not come so near as to touch the old one, but just near enough to draw away all the toll from it.

If it would not be lawful to grant a new free bridge, is it lawful to grant a new toll bridge, with similar or less toll, side by side of the old one? What difference is there in the principles of the law applicable to the two supposed cases? I think there is none. The only difference is in the amount of injury which would be sustained from the free or from the toll bridge. The latter would take away perhaps three fourths or more of the franchise first granted, the former, the whole. As if it were lawful to impair the original grant to any extent short of its annihilation!

It has been suggested, but not much pressed, that the legislature has as much right to grant rival bridges, as they have to

grant rival banks and insurance companies. But there is an obvious difference between these cases. Grants of banking and insurance corporations merely give an *authority* to manage their private concerns. A mere faculty or power of doing, in a corporate name, what they might at common law have lawfully done as individuals. But bridges and ferries are *publici juris*. A toll is granted for a service rendered to the public. The bonus which banks or insurance companies pay for their charters, does not make them matters in which the public have an interest. They may discontinue them and divide the stock just when they please, paying their debts. No individual can compel a bank to lend him money, or an insurance company to write upon his ship, unless they please. But the proprietors of the bridge or ferry are under great liabilities to the public; are compellable to permit the public to use them, paying toll. To use the words of the old law as to ferries, "they are liable to grievous amercements," for non-performance of their duty.

It has been argued that the legislature has the right of determining upon the expediency of granting bridges, turnpikes and ferries, and that those grants are to be taken subject to the implied right of the legislature to make others, wherever and whenever, in their opinion, the public good requires, without compensating for any injury which former grantees may receive from such subsequent grants, in any other way or degree than *to the legislature itself* should seem right.

If that proposition be true, it proves that legislative grants may indirectly be avoided and defeated, at the will of the grantors; so that their grantees for valuable consideration will not, in fact, have any beneficial right of property in them. It would by implication insert in every such grant a provision, that it should be held at the will of the grantor, notwithstanding it purported to be for certain years to come.

Much reliance has been placed upon the case of *Tripp* v. *Frank*, 4. T. R. 666. That was an action for an alleged injury to Tripp's ferry over the river Humber, from Kingston upon Hull to Barton. The defendant carried passengers from Kingston to Barrow, three miles below Barton. But those passengers had no intention of going to Barton, but only to Barrow,

and the ferry-men were under no obligation to carry them to Barrow. The court held, that they were not obliged to pass over the ferry to Barton, (where they did not want to go,) to get to Barrow circuitously, when they might go thither directly in the defendant's private market-boat.

Let us suppose the Charlestown ferry in operation, and adapt that case to the adjacent topography. Substitute Charlestown for Kingston, Boston for Barton, Sewall's Point in Brookline for Barrow, and Charles river for the Humber, and the case would stand thus, upon a comparison with the case at bar. If a passenger wanted to go from Charlestown to Sewall's point, he should not be obliged to pass over the ferry to Boston, and from thence to Sewall's point by the way of the Roxbury neck, or Western avenue, if he could get an individual to carry him in his boat directly to Sewall's point. Be it so. But suppose the passenger really wanted to go to Boston, and procured an individual to carry him a little above or a little below the ferry-ways on the Boston side; that would be a fraud upon the owner of the Charlestown ferry. "For (said the court in *Tripp* v. *Frank*) if certain persons, wishing to go to Barton, had applied to the defendant, and he had carried them a little distance above or below the ferry, it would be a fraud on the plaintiff's right, and would be a ground of action." Now, if it were not for the great respect I have for my learned brethren, I should have thought that *that* case was much in favour of the plaintiffs. *It proves conclusively, that the franchise extends beyond the ferry-ways, and protects the owner against near and injurious transportation.* It seems to point out, in direct and strong language, the injury which the defendants inflict. They transport persons who desire to go to Boston, taking them up a little above the old ferry-ways on the Charlestown side, and landing them a little above the ferry-ways on the Boston side. The court say, in the case cited, that "*this is a fraud upon the plaintiff's right.*"

There is a provision in a colonial ordinance, "that whosoever hath a ferry granted upon any passage, shall have the sole liberty for transporting passengers from the place where such ferry is granted, to any other ferry-place where ferry-boats are

to land, and any ferry-boat that shall land passengers at any other ferry, *may not take passengers from thence*, if the ferry-boat of that place be ready." For example—it might be lawful for the Winnesimmet ferry-boat to carry passengers to Charlestown ferry, but not from thence to Boston, unless the Charlestown ferry-boat was not ready. Col. Laws (edition of 1672), 50, *tit. Ferries.*

But it is said that there has been a uniform course of legislation which should govern the construction of the grants now under consideration. And we have been referred to the charters for the West Boston bridge, the Canal bridge and the Prison Point dam, the Mill-dam or Western avenue, South Boston free bridge, Malden bridge, Chelsea bridge, which destroyed Winnesimmet ferry, and of two parallel turnpikes from Boston to Watertown.

In regard to the Western avenue, perhaps it could not be considered a nuisance to the Charles river bridge, especially after the proprietors of the Charles river bridge had received compensation from the West Boston bridge which is between them. Besides, the Western avenue leads from Boston westerly to Brookline, and would not materially, if at all, affect the course of travel between Boston and Charlestown, communicating with the northerly and easterly parts of the state. If the plaintiffs had complained against the proprietors of the Western avenue, it is very probable that a jury would not have found it to be a nuisance, in view of all the facts which have relation to it.

In regard to West Boston bridge, such compensation was required by the legislature to be made, as induced the proprietors of the Charles river bridge to acquiesce. They had an extension of their charter for thirty years beyond the term of the original grant, and the fact, "that the erection of the proposed bridge might diminish the emoluments of the proprietors of the Charles river bridge," was mentioned in the report of the committee which was accepted by the legislature, as one of the reasons which induced them to make the additional grant. It is true indeed, that the committee report as their opinion, "that there was no ground to maintain that the act incorporating the

proprietors of Charles river bridge, *was an exclusive right to build over the waters of Charles river.*" And that opinion may be very well founded; for the river extends many miles beyond West Boston bridge to places which could not be considered as near to Charles river bridge. Besides, it is at most to be considered as the opinion *of one party* to a contract. But it was represented by the proprietors of Charles river bridge, that it would "operate *injustice and injury*" to them, if the legislature should grant the charter for the building of the West Boston bridge. The corporation did not apply *in forma pauperis*, but *under a claim of right;* and the legislature thought it reasonable and proper to make the additional grant. But why was it reasonable or proper, if, by the true intent and meaning of the original grant, the proprietors of Charles river bridge were limited to the width of their bridge?

It was said, and not denied, that the free bridge at South Boston was not opposed by a majority of the proprietors of South Boston toll bridge, because their real estate would rise in value more than they would lose by the free bridge.

The Winnesimmet ferry is over a wide arm of the sea between Chelsea and Boston. It sustained some damage by the Malden bridge (which was erected where the penny ferry had been before kept), but more damage by the Chelsea bridge. If Williams, who owned the Winnesimmet ferry, had taken any legal measures to vindicate his rights, they would have been ascertained, and the injury redressed, if any had been sustained. The law was as free for him as it was to Chadwick. All that is proved in that case is, that the legislature did not think it was one which required a compensation. And from Williams's acquiescence it may be inferred, that he did not think it was worth the trouble and expense of a lawsuit.

The same remark may apply to the case of the rival turnpikes. There has been no judicial investigation. We know not how far the proprietors expected their indemnification to arise from toll, or from the additional value which their roads would confer on some other property of the proprietors.

All the injury sustained by the Malden bridge, by the erection of Chelsea bridge, was compensated by permitting the former to become interested in the lattter.

In the case of the Canal bridge no compensation was granted to the plaintiffs. Probably the legislature believed that a great part of the travel which would pass over the Canal bridge would have passed over the West Boston bridge, for the building of which, compensation had been made to the plaintiffs, by an additional charter.

And the Prison Point dam was for the accommodation of persons going from Charlestown to Cambridge, and so within the principle of *Tripp* v. *Frank*.

Sometimes the legislature made a compensation to a party injured by their grant, and sometimes they did not. In the latter case the presumption would be, that they thought the party had no just claim for damages; and if he acquiesced, that presumption would be strengthened.

In most cases the compensation was accepted, and of course there was nothing heard of claims for damages in such cases. Thus, on the same day that the charter for Haverhill bridge was granted over the Merrimac, a charter was granted for a bridge over the Piscataqua. And a provision was made for compensating the injury which the ferry there would receive, somewhat analogous to that which was made to Chadwick. But no provision for a jury was made in either case. Whether Rice (who owned the ferry) accepted it or not, I do not know. If he had resisted, his legal rights would have been maintained.

It is not safe to follow legislative precedents in the formation of a judicial opinion. We have a report of my Lord *Coke*, of an unwarrantable grant made by Queen Elizabeth, and a similar grant made by her father, Henry VIII, was cited to support the grant of the queen. But the court, "*nullo contradicente aut reluctante*," held her letters patent to be void. I would say in regard to this part of the case, as the court did in that, "*quod judicandum est* legibus, *non* exemplis."

It has been contended for the defendants, that if the legislature could not lawfully grant bridges and ferries when and where they thought the public good required, great inconveniences would follow. Now I am not disposed to maintain in this argument, that the legislature may not grant as many charters for bridges, &c. as they may think necessary for the public accom-

modation. Let them take private property for public uses, but not in welcome, unless it be given; not at their own price against the will of the owner, but subject to a compensation to be fixed by a jury of the country.

That is the manner in which private property is protected in England. And when it is taken by the authority of parliament for public uses, the special authority must be strictly pursued. *Rex* v. *Croke*, Cowp. 26. If the persons refuse or are unable to agree, the damages are assessed by a jury. The government take what they want for the public accommodation, but they pay for it, at an agreed price, or an assessment of a jury. *Leader* v. *Moxton*, 3 Wils. 466. In New York the same just principles are adopted. *The People* v. *Platt*, 17 Johns. R. 195; *Bradshaw* v. *Rogers*, 20 Johns. R. 106.

Again, it is said that the rule contended for by the plaintiffs is impracticable and uncertain. How near (it is inquired) is it within the authority of the legislature to grant a new bridge, without creating a private nuisance to one which had been before granted?

Now I think the plaintiffs are not to answer that question "by compulsion." It is not necessary for them, *in this case*, to fix *precisely* how far on each side of their bridge their franchise extends. If they are not confined to the width of their bridge, the defendants' bridge must be considered *near*. It is in effect side by side. It leads from the same promontory in Charlestown to the shore directly opposite. So that if the terms of the original grant of the ferry and bridge were less extensive than the law would imply, they are certainly broad enough to cover the place where the new bridge has been granted, unless, as has been before said, the right be confined to the width of the bridge. But if the terms of the grant were as broad as a grant of a ferry across a river, and the question should be asked, how near to it another should be granted, I would answer in the words of the books, so near as not to impair the profits of that first granted. Or, to use the words of Chancellor *Kent* in *Ogden* v. *Gibbons*, 4 Johns, Ch. R. 161, when speaking of the freehold interest in a ferry, or fair, or market, "the grant must be so construed as to give it due effect, by excluding all *contigu-*

ous and injurious competition." These questions may be settled in regard to a bridge, just as they have been for ages settled in regard to a ferry. They are to be tried and determined by a jury, unless, as in the case at bar, that mode of trial is waived by the parties, who consent that the court shall try the facts as well as the law. Thus it is said in Fitzh. N. B. 184, *A.* note *b*: "*It shall be put in issue, whether it be a nuisance or not.*" 16 Vin. 26, *tit. Nuisance, G. pl.* 2, *S. P.* To maintain that issue, the law would require of the plaintiff to prove that his was the elder franchise, that the new one was near, and that it impaired the profits of that which was first granted. Haverhill bridge was, in contemplation of law, *near* to Chadwick's ferry, although it was *at the distance of forty rods.*

But then it is inquired, what diminution, or shall every possible diminution of profits entitle the owner of the ancient franchise to a remedy? That question need not be definitely settled *in this case*, for the new bridge has already taken three fourths of the profits of the old one. But I have no difficulty in meeting that question. If there were only small damages proved, small damages would be recovered. If it came within the rule of *de minimis*, &c. the law would not concern itself to afford relief. There is no more reason why one entitled to small damages should not recover in this, as well as in any other judicial proceeding.

It was suggested in the course of the argument for the defendants, that the franchise, being a *local incorporeal hereditament*, might be considered as real estate, for the taking of which their act of incorporation makes provision for a compensation, to be ascertained by jury. But the provision was evidently intended to operate in a more limited sense. If that had not been the case, the word *property* (which is used in the constitution) would have been employed, instead of the words "*real estate.*" It is clear therefore that no provision was made for any injury to the plaintiffs' franchise. I forbear to remark on the great amount of property involved in the decision of this cause. Immense as it is, it would be purchased too dearly by the violation of the plighted faith of the state.

I lay out of the case all the objections which have been made to the right of the plaintiffs to have the benefit of their additional charter, by reason of any alleged fraud in obtaining it, or for an alleged want of an acceptance, or non-performance of duties required by it:—and in this, I am happy to concur with my brethren. The existence of the plaintiffs as a corporation is acknowledged in the charter to the defendants, and the validity of the additional charter can be properly questioned and tried in a *quo warranto*, in behalf of the state, and not in this incidental manner by a stranger.

Something was suggested in the argument for the defendants, about the solicitude which the Court must feel in deciding against the validity of legislative enactments. It should be remembered however, that the solicitude which a judge should feel, does not arise so much from the power and situation of the parties, as from an anxiety to understand and declare the law of the land which is applicable to the case. When, after patient hearing and examination, he has arrived at that point, there should be an end of solicitude. The consequences, which may be expected to follow from the law, are common to the judge and his fellow-citizens. I speak not of personal consequences and expectations, which, as they have little or no tendency to show what the law is, are not to have influence in the decision. I am free to declare, however, that the principles and results which I would adopt, would be as beneficial, as they appear to me to be clear. There would be a continued and increasing confidence in legislative contracts. Men of capital and energy would embark their funds in enterprises of a public character, in the hope that their own fortunes might be advanced with the public prosperity. The state would command the wealth and services of the people. But let the reverse of this be suspected, and public credit will be paralysed. It is more sensitive than the plant which withers upon the touch, but will revive. Touch public credit, and it dies. It may stand awhile, as a tree which has been destroyed by the worm at the root, but will yield neither fruit nor shade when most needed.

In the construction of contracts, the law regards the subject-matter more than the manner; the substance more than the

form; the spirit more than the letter. "*In fide, quid senseris, non quid dixeris, cogitandum.*" Cic. *De Off. lib.* 1.

There are some facts in the case which show the intent and meaning of the parties to the act of 1784, in language not to be misunderstood. All the direct communication between Boston and Charlestown had been over the ferry there, from the first settlement of the country. The petitioners for the bridge referred the legislature to that fact. They in effect informed them of the sources from whence they expected to derive their revenue. The travel from the *west* and from the *north* and from the *east*, passing from Charlestown to Boston, was to pass over a toll bridge, instead of a toll ferry. And that toll was to be for the use of the petitioners. *That* was the ground work, upon which their then perilous enterprise rested. And the legislature, by their granting their petition, assented to all the reasonable expectations which it had disclosed.

If it had been proposed to pass an act for the sequestration of the toll of Charles river bridge to an amount not exceeding 60,000 dollars, to build a bridge for the use of the commonwealth where the Warren bridge has been built, it is not believed that any member of the legislature would have voted for it. A sense of justice would have prevented the adoption of a measure so inequitable and oppressive upon its front. But what is the difference between a sequestration of the money actually in the plaintiffs' treasury, and an act to prevent that amount from going into their treasury. I ask, what difference is there in effect, of the one and of the other upon the plaintiffs' interest. The difference is in form only, not of substance, assuming, what it is believed cannot be denied, that all the travel over the Warren bridge would have passed over the Charles river bridge, if the Warren bridge had not been built.

By the 10th section of the 1st article of the constitution of the United States, it is provided, that no state shall pass a law impairing the obligation of contracts. By the 10th article of the declaration of rights in the constitution of Massachusetts, it is provided, that "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." By the

12th, "no subject shall be deprived of his property, immunities, privileges or estate, but by the judgment of his peers, or the law of the land." By the 15th, that "in all controversies concerning property and in all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practised, the parties *have a right to a trial by a jury;* and this method of procedure, shall be held *sacred*, unless, in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it." It has not been contended that the case at bar falls within the exception.

6. I proceed to consider very briefly, the operation of the new bridge, and the consequences resulting from the grant of it.

When the charter for the erection of the Warren bridge passed, the plaintiffs had a right to the toll granted to them for the transportation over their bridge between Boston and Charlestown, for twenty-eight years then to come. The defendants are authorized by the legislature to build the new bridge, but they are to be paid for all costs and charges, and with interest too, out of the toll withdrawn from the old bridge. *The effect will be thus to compel the plaintiffs to pay for the new bridge.* But that is only the beginning of their trouble. When it is built with the money so by the legislature withdrawn from the old bridge, the plaintiffs are not to have it. In six years, or sooner, the state is to come into full possession of it in complete repair. If there should be no more legislation about the matter, it then becomes a free bridge. If the present rate of toll should be continued, it will probably take three fourths or more of the toll from the proprietors of the old bridge. If the rate should be lowered, a greater proportion will be withdrawn, and the state, (the grantor !) the party without whose permission the new bridge could not have been built, the party contracting with the plaintiffs, by force of their own act, will receive the toll to their own use. It would be very doubtful if the plaintiffs could collect toll enough at the old bridge to pay the annuity to the college. And if the state should leave the new bridge open as a free bridge, the plaintiffs' franchise will be utterly destroyed.

I think the last grant would not be supported by the law of England, if the question were between the king and his subject. The principles of the common law and of natural justice, would restrain the royal prerogative. The right of a trial by jury would be there maintained. It would be a matter of deep concern, that property should be less protected under our free institutions than it is in our parent country. We have embodied the principles of the common law and of natural justice in our constitutions of government, which are paramount to legislative enactments, and binding upon the judicial department.

Now with all my habitual and sincere respect for the legislature, I cannot but think that the grant to the defendants is inconsistent with the grants before made to the plaintiffs. The last act must have passed without a due regard to the constitutional rights vested in the plaintiffs. It impairs the obligation of the grants before made to the plaintiffs. It takes away their property for public uses, without compensation, against their consent, and without provision for a trial by a jury. It is therefore void.

In my judgment, therefore, the plaintiffs have maintained their complaint, and this Court should grant relief.

Parker C. J. [After stating the pleadings.] Several preliminary questions arising out of these multifarious pleadings appear to us not to require much consideration. The first is, whether the act of 1791, extending the franchise of Charles river bridge, was accepted or not. It was for the benefit of the corporation, and therefore may be presumed to have been accepted. It was accepted formally by vote before the expiration of the first charter, and before the granting of Warren bridge, which is sufficient.

In regard to the relinquishment of double toll on the Lord's day, it appears that from about the time of passing the act of 1791, they ceased to exact it, and that it has not been taken since; which is a sufficient relinquishment.

There have not appeared, on the argument, any facts in controversy which have any important bearing on the principal questions. The allegation of fraud in obtaining the extension of the charter has not been made a matter of argument, and it has been properly omitted; for it does not appear that the legislature have ever called in question their grants on this or any other

ground, and none but the public could raise that question ; and they, only by legal process, such as a *quo warranto*, under which the corporation might defend themselves against such a charge. Indeed the recognition by the legislature, of the corporation of Charles river bridge, in the very act incorporating the Warren bridge, and of their right to continue, and discharging them from half the annuity to Harvard College, is a sufficient answer to this charge.

The way is thus prepared for the consideration of the real questions in the case, which are indeed of solemn import, and require, as they have received, the most deliberate attention which our time and opportunity will admit of.

The argument on the part of the plaintiffs rests upon divers propositions of a general nature, and upon the application of them to the facts which exist in this case.

The propositions themselves are either so clear as to be admitted by the counsel for the defendants, or so well settled by judicial tribunals of the highest authority, as would render any attempt to shake them wholly unavailing.

That a grant of land or other property, or of a franchise, by a legislative body, having authority to make the grant under the constitution by which alone they can exercise any power, is a contract touching the thing granted, which cannot be repealed, annulled, or restricted in its operation by the power which grants, otherwise than according to a fair construction of the terms of the grant according to the rules and principles of law affecting like grants or contracts made by individuals, and by process administered by the ordinary judicial tribunals, was settled in the case of *Fletcher* v. *Peck*, 6 Cranch, 87. Indeed, without any adjudication, the principle so clearly and necessarily results from the original constitution of free governments, and the maxims of universal justice, that it never could be called in question but in times of misrule and anarchy.

That the property of individual citizens cannot be appropriated to the public use, except that portion of it which he contributes proportionally with all other citizens, without a just and reasonable compensation, and this not at the will of the public agents, but to be assessed and determined by his peers in a trial by jury,

is declared by the 10th article of the bill of rights prefixed to our constitution, and in one of the amendments to the constitution of the United States; declared only, and not enacted or for the first time made law; for without these provisions, I hesitate not to say, that nowhere, except where a despotism of some kind or other existed, could the government lay its hands upon the property of any subject without making him a fair compensation, and hold it against the judicial power of such a government.

And even where no property is taken to the public use, but the rights and interests of any one in a contract shall be attempted to be impaired or destroyed by an act of legislative power, such act becomes wholly inoperative and void by a most wise and wholesome provision of the constitution of the United States, which has been enforced in several cases of the highest importance, by the Supreme Court of the United States.

These fundamental principles are no longer considered disputable; they are admitted in their fullest extent by the counsel for the defendants in this case; and on the other hand, it is admitted by the plaintiffs, that an act of the legislature, whether it be a law, or a grant, or a contract, if not repugnant to either constitution, cannot be called in question by the judicial tribunals on the ground of inexpediency, or injustice, or inconvenience to any individual citizen on whose property or interests it may have an injurious operation. So that the questions before us are not questions of principle, but of application of principles to the facts and circumstances of the case on trial.

To show then that the authority under which the defendants justify the erection and maintaining of the Warren bridge, which is so manifestly prejudicial to the interests and property of the proprietors of Charles river bridge, is not available to that purpose, the latter assert, that by virtue of the act of 1784 and that of 1791, and the consent of the President and Fellows of Harvard College, they became the lawful owners and proprietors of an exclusive right of transportation by means of their bridge, of all passengers and vehicles over and across Charles river between Boston and Charlestown, for the toll established by the act of 1784, for the term of seventy years from the first opening of the bridge to travel; that this was a franchise which they derived

from the grant of the legislature, for which they paid a valuable consideration in the expense of erecting and maintaining the bridge, and in the annuity of 200*l.* which they have paid and are bound still to pay to the President and Fellows of Harvard College; that this is a property, within the sense of that term as used in the 10th article of the declaration of rights, and therefore, admitting that the public interests required it should be taken from them and appropriated to the public use, yet as no compensation is provided for them in the act by which it is attempted to be taken from them, that act is wholly void; and that the bridge built under its supposed authority, as it diverts from their bridge a large portion of its travel and profits, is a nuisance, which ought by this Court, by virtue of its authority under the statute of 1827, *c.* 88, to be abated, or that some other sufficient remedy should be applied.

This is one ground on which it is supposed the bill ought to be sustained and relief granted, on the principles and provisions of the constitution of this commonwealth, without reference to the constitution of the United States.

But it is also contended, that although the interests and rights of the proprietors may not come within the meaning of the term *property*, as used in the 10th article, and although the act of 1827, incorporating the proprietors of Warren bridge, may not be construed to be an appropriation of their property to the public use, so as to make a provision for compensation essential to the validity of that act; yet that the acts of 1784 and 1791 relative to the Charles river bridge, constituted a contract between the public and the proprietors of Charles river bridge, by virtue of which those proprietors acquired a right, exclusive of all others, to the transportation over their bridge, of all persons who should have occasion to pass and repass between Boston and Charlestown, co-extensive with the right of the old ferry, for the term of seventy years, and that there is an implied contract in those acts, that the public should not, through the legislature, grant authority to any other person or corporation to erect any bridge, or to establish any other mode of transportation, so near to Charles river bridge as to draw from it any portion of its travel, and thereby diminish its profits; and that the act incorporat-

ing the proprietors of Warren bridge necessarily having this effect, without providing any indemnity for the proprietors of Charles river bridge, is void by the constitution of the United States, which inhibits any state from making or passing any law which shall impair the obligation of contracts.

These two propositions, on which the merits of the bill rest, are in some measure distinct in their character, as they are referred for their support to the different constitutions of the United States and the commonwealth, but the same general principles seem necessarily involved in both; or at least both of them, to my mind, seem to be equally affected by the provision of the constitution of the United States. If by virtue of the legislative acts, and the supposed succession to the rights of the college by virtue of those acts, a property was acquired in the franchise of toll to the extent contended for in the first proposition, it is because these acts assume the character of a grant or contract to that effect; and then a subsequent grant to another corporation, inconsistent with the right so acquired by the first, unless in a form warranted by the constitution, would be, directly or indirectly, but necessarily, to impair the obligation of the first contract, and so would fall within the prohibition of the constitution of the United States, as well as within the 10th article of the declaration of rights in the constitution of Massachusetts; so that a decision on either branch of the case would seem to me liable to a revision by the Supreme Court of the United States, within the constitution and laws providing for the appellate jurisdiction of that court.

In discussing the first proposition, it seems to be necessary to consider briefly the right enjoyed by the college to the ferry, previous to the act of 1784, by which the building of Charles river bridge was authorized; and then, whether by virtue of that act, that right, whatever it may have been, was transferred or passed over to the proprietors of Charles river bridge.

The property or right in the ferry is supposed to have been granted to the college, by the existing government of the colony, in the year 1640; which was two years after the establishment of Harvard College, according to the account of this institution given by Hutchinson, its foundation by the government having

been laid two years before, *viz.* in the year 1638. In an ordinance respecting the college it is recited, that "for the encouragement of the college this court hath given the sum of 400*l.* and also the *revenue of the ferry* betwixt *Charlestown* and *Boston.*" This I should judge was in 1638, a ferry then being in existence by authority of the colonial government, probably under lease to Converse, it appearing to have been leased to him in that year by some agents of the government. This first grant to the college, of the revenue of the ferry, perhaps would not be construed to be a grant of the ferry itself in full property, but might be satisfied by leaving the property and right and the whole control to the government, paying over to the treasury of the college the net revenue thereof.

But in 1640 a direct grant of the ferry itself was made to the college, which, according to the usual interpretation of the simple terms generally made use of in public proceedings of that day, would be construed a grant of the ferry itself and all its rights to the college in perpetuity, unless the effect should be found to have been controlled or restricted by contemporary acts, or acts passed soon after, showing clearly the intent of the legislature to have used the term *grant* in a more limited sense. The words of this grant are, "the ferry between Boston and Charlestown is granted to the college." This probably was intended to grant to the college no more than what had been previously granted, that is, the revenue of the ferry or the profits of it; because the ferry itself was at that time in the hands of Converse or some other lessee, it appearing that in 1637 power was given to the governour and treasurer to let it for three years, and Converse being the lessee in 1638. And in 1640 authority was given again to let it on the expiration of Converse's lease. And that this was the sense in which the grant was considered, may be inferred from the ordinance of 1650, by which the power of leasing is given to the college, the ferry having been, until that time, leased by authority from the government, the college enjoying undoubtedly the rent. And in 1654, "it is ordered by this court and the authority thereof, *that besides the profit of the ferry* formerly granted to the college, which shall be continued, there shall be levied," &c.

To me it appears, from these several colonial acts respecting the college and the ferry, that the absolute property in the ferry itself was not intended to be vested in the college; but still, as it was undoubtedly intended that they should enjoy the revenue, and as they did enjoy it, under various modifications, down to the time of the incorporating Charles river bridge, it would be considered that the government charged itself as trustee of the ferry for the benefit of the college, and that afterwards they relinquished this trust, and the college thus became owners of the ferry, subject to such regulations as should from time to time be made by the legislature for the public accommodation and convenience. These regulations are not inconsistent with a right of property in the college, for the legislature having originally the only right to grant the exclusive privilege of transportation over public waters, and to establish tolls, &c. the grant of this privilege would always be considered as subject to the superintendence of the legislature, unless that was expressly surrendered.

I entertain no doubt, therefore, that in the year 1785, Harvard College was the proprietor, in the sense above mentioned, of the ferry between Boston and Charlestown, and that it could not constitutionally have been taken from them without their consent.

But what was the ferry-right conferred by the colonial government on Harvard College? Was it exclusive along the whole shores between Boston and Charlestown, or limited to the ferry-ways as they existed at the time of the original grant? It does not appear to me that either one or the other of these constructions is the true one.

It is material to consider the state of things at the time, in order to ascertain the nature and extent of this grant. There was pre-existing a ferry, which was the object of the grant; it was in the hands of Converse under a contract with the government; it had been established before the lease to Converse, and all the subsequent proceedings must be supposed to have had reference to the ferry as at first established.

The first we learn of it is from the record of the court of assistants, entered November 9, 1630; probably the first

act of legislation by the new government. It is ordered, "that whoever shall first give in his name to Mr. Governour, that he will undertake to set up a ferry betwixt Boston and Charlton, and shall begin the same at such time as Mr. Governour shall appoint, shall have 1*d.* for each person," &c. And on November 5, 1633, there is this record; "Mr. Richard Brown is allowed to keep a ferry over Charles river, against his house, and is to have 2*d.*" &c. This ferry was then from the Charlestown side only, and in 1635, it was ordered that there should be a ferry set up on the Boston side, by the Wind-mill hill. In 1637 or 1638, the ferry, that is, the existing ferry, between Charlestown and Boston, was leased to Converse. And in 1640 the same ferry, that is, the ferry then existing between Charlestown and Boston, is granted to the college.

Now I am not able to gather from these records, any thing like an exclusive grant to the college, of a ferry along the whole shore of the two towns. It was exclusive in one sense; that is, no individual could set up another ferry without the license of the government, who had the ordering and disposition of all passages over public waters; but I think the government itself was not precluded from establishing another ferry between Boston and Charlestown as soon as the population of either town should have so spread as to have rendered it highly inconvenient to be confined to the old ferry. If, for instance, West Boston, then probably a waste, had in twenty years afterwards become as populous as it now is, and a ferry from a southerly point in Charlestown to Barton's point had been deemed to be for the public convenience, I think the colonial legislature would not have hesitated, and I think that they need not have hesitated, to establish such a ferry, without making any compensation to the old ferry, unless an actual injury was thereby done, because they had done nothing in their former grants which could be fairly construed to take away this right. They granted a ferry between Boston and Charlestown, or the ferry as it then existed with reference to the actual state of population and business, without restraining themselves prospectively from providing for future exigencies.

They certainly did not mean to secure to the owners of the ferry the right to transport for toll all who should have occasion to visit Boston through Charlestown, or the country from Boston, for two centuries, and as much longer as the country should endure. They were providing for existing necessities; they were desirous of adding something to the income of the college, and established in their favour this easy contribution from the people, valued at about 40*l.* *per annum;* and this was to continue with all its natural increase until the throng of passengers should demand another ferry, or a bridge, or some other mode of transportation; then, if it became necessary to destroy the ferry, they would have been bound to indemnify the college for their actual loss; or if they diminished their income, they were to make it good, because it was within the fair construction of their grant, that they would do nothing to defeat it or diminish its actual value. They could not have resumed their grant of the ferry, without paying the proprietors, nor could they indirectly destroy its value, by the grant of another ferry so near as to draw away its custom. But had the public interest required that a bridge should be erected instead of a ferry, of which public interest the legislature must be the judge, they could consistently with public justice and with the right of private property have made this change, only providing for a just compensation to the proprietors, for the value of the property as it would then be estimated. This restriction upon the sovereign power does not, I apprehend, depend upon any limitation of its authority by written constitution, but results from the immutable principles of justice, which require an equal contribution to public exigencies, and would prohibit the sacrifice of the property of one, even for the advantage of the whole. Such principles are recognised in all civilized governments, and if not expressly declared, are practically acted upon. 2 Kent's Com. 270. I speak of acts of the government the direct and immediate effect of which is the destruction of private property, or the appropriation of it to public use. There are cases of a questionable nature, where great private loss may be the consequence of some public act for the general good, which do not fall within this principle.

It is the right and the duty of all governments, especially those over new countries, to facilitate the intercourse of business between its subjects by opening new roads and constructing new avenues as the population, and the consequent demands for such improvements, shall increase. In doing this it will often happen, that estates upon old roads are diminished in value; the seat of business may be transferred from one town or village to another; inns and stores, erected with a view to the travel or business as it exists, may become deserted and of little value; but the proprietors would have no claim upon the government for redress, for it is necessarily one of the contingencies on which property is acquired and held, that it is liable to be impaired by future events of this kind.

The whole history and policy of this country from its first settlement, furnish instances of changes and improvements, the effect of which has been to transfer the adscititious value of real estate in one town, resulting from its favourable position for trade, to another, which, by alteration of roads, erection of bridges, or more recent interior settlements, has taken its place as a thoroughfare, or as a place of transit or deposit for articles of merchandise. Losses of this kind never have been, and probably never will be compensated; nor can compensation be reasonably expected by the sufferers, any more than by the dealers in any branch of trade or in any mechanical employment, who find their profits and emoluments diminished and sometimes destroyed by the change of fashion, or by new inventions for carrying on the same branch of business in a cheaper and more acceptable manner. Such losses are the effect of the general system of legislation upon subjects of this nature, adopted in the early part of our history, and constantly practised through all the changes of government; so that property is in fact held upon a tenure which admits of its deterioration in value from causes of this kind.

And I confess I do not see why the same principles do not apply to property in ferries and bridges to a considerable, if not to the whole extent. Ancient ferries held by prescriptive title, if there be any such in this commonwealth—which may be doubted, as it is well known that the government originally as-

sumed the right to establish and regulate them, either by the direct act of the legislature, or by the power delegated to courts of sessions or towns, and therefore their title may be found on record—ancient ferries held by individuals may be subject to the rules of the common law, qualified by the usages, and the general legislative provisions of this commonwealth, or of the antecedent governments. Certainly the proprietors may maintain their rights against individuals who invade them without authority, by the application of those rules.

By the common law, if there be an ancient ferry and another be set up near to it, so that its profits be diminished, an action will lie for damages, and probably also the use of the new ferry may be restrained by injunction from chancery.

I imagine the mere fact of diminution of toll to the ancient ferry would not prove the new ferry to be a nuisance, if it were set up under license of the government. It must in a positive sense be near to the old ferry, and not merely so near as to draw away some of the custom; for that may happen if the ferries are five miles apart. This is the doctrine of the books, though it is sometimes held, that if the new ferry only be so near as to produce the injury, it is a nuisance. This latter doctrine certainly could never have been received in this country. Ferries were first established to accommodate the inhabitants, who were generally settled on the shores of bays or creeks, or on the banks of rivers. They were connected with roads leading to some market town, and settlers in the interior were obliged often to go by circuitous routes in order to cross a river, or other water obstruction, by a ferry. As the population increased in the country, new and more direct routes would be explored to the sea-ports, and they would come to the river several miles above or below the ferry. A new ferry or a bridge in the line of the new route would be demanded for common convenience and necessity, but thereby the profits of the old ferry might be materially diminished. Cannot the public authorities establish such a necessary accommodation without making compensation for the loss? I think the answer must be in the affirmative.

I have seen no case which denies this right, but several which recognise the principle. The case of *Chadwick* v. *The Proprietors of Haverhill Bridge*, does not contradict it. Chadwick's ferry, as stated in the account of the case given by Mr. Dane in his Abridgment, was ancient; the bridge was built within forty rods. Upon Chadwick's representation to the legislature, provision was made for his indemnity by commissioners. He preferred an action at common law, which was submitted to reference, and an indemnity was awarded to him. There was no decision of the Court, but it may be inferred that the action was considered as rightly brought. As that is the only case to be found on our judicial records, it is unfortunate there was no discussion of principles. All we can know is, that by the erection of the bridge, the ferry was entirely destroyed, and that upon such a quēstion it was intimated by the Court, that a party so situated had a right to his trial by jury. Whether the nearness of the bridge to the ferry, and the consequent abolition of the ferry, was not the material fact on which the cause turned, does not appear, or whether, if the bridge had been authorized a mile above or below the ferry instead of forty rods, an indemnity would have been thought necessary, cannot be ascertained. At most, the case is authority only for a decision, that if a bridge be built by license of the legislature within forty rods of an ancient ferry over the same river, the proprietor of the latter is entitled to indemnity.

In the case of *Tripp* v. *Frank*, the plaintiff was lessee of the corporation of Kingston upon Hull, of a ferry which the corporation held by prescription, between Hull and Barton, on the opposite coast, at the distance of seven miles. The defendant carried persons at several times in his own boat from Hull to Barrow, which is two miles lower down the Humber than Barton. The court held that the action could not be sustained, unless the object of the passenger was to get to Barton by the way of Barrow, and so the transportation by the defendant was in fraud of the ferry.

This case, though it recognises the general principle of the common law in regard to ferries, yet is pregnant with qualifications which are exceedingly important in the consideration of

this subject. It is stated in the case, that there was no other ferry on the Lincolnshire coast upon the river Humber; consequently all who would pass from Hull to the other side of the river for a great distance, would be obliged to cross this ferry, unless private persons should accommodate them with a passage in their boats. Of course such accommodation would materially affect the profits of the ferry; but it was held unreasonable to require that persons going to Barrow should be obliged to land at Barton and go from thence two miles by land down the river to Barrow. For the same reason it must have been held, that persons might be transported from Barrow to Hull, without going to Barton to take the ferry there. The plaintiff's right of ferry exclusive was only betwixt Hull and Barton. Hull is a place of great business, with a population of 27,000. Barton has a population of 6000, and Barrow somewhat short of 2000. Between the latter place and Hull there must necessarily be great intercourse, Hull being a great market town.

Upon this principle, the transportation of persons from Boston to Cambridge, either at Cambridge Port or at Lechmere Point, would be no infringement of the right of the ferry between Boston and Charlestown, and consequently the grant of the bridges in these several places could not be questioned on the ground of interference with their right.

I should further infer, that a ferry from the southerly part of Charlestown to Barton's point in Boston, might have been established without any right in the proprietors of the old ferry to complain, because there is a grant of a ferry or the ferry then existing, between Charlestown and Boston, which was practically limited from Charlestown to the northerly part of Boston.

The case here commented on turned principally upon the question put to counsel, whether the lessee of the corporation was obliged to carry any passenger to Barrow; and upon its being answered in the negative, the court said the right was commensurate with the obligation. So in the case supposed, it is clear that the owners of the ferry could not be obliged to carry persons to West Boston, and therefore they had no right to toll from persons going there.

If it should be said that this case recognises an exclusive right in the corporation of Hull to transport persons from one side of the river to the other through the whole extent of the two opposite towns of Hull and Barton, and that the right of the college was therefore exclusive between Charlestown and Boston, I should say they proved their exclusive right by prescription and usage, and the right of the college depends upon the words of their grant, which words are not exclusive; and that Barton's point, at the time of the grant to the college, was as distinct from Boston, as contemplated by the colonial government, as Barrow is from Barton; it being the circumstances of the places and the distance, not the mere fact that they were distinct towns, which governed the decision.

And the same qualifications of ferry rights were adopted on a more general scale, in a case in the exchequer in the year 1659. There was an ancient ferry by prescription at Branford in Middlesex, and the defendant had usually in his boat ferried over persons about three quarters of a mile from the old ferry on the Thames, to the prejudice of the plaintiff's common ferry; and the suit was to suppress the new ferry. The court dismissed the bill, saying it came too near a monopoly and restrained trade. The reporter, Hardres, subjoins a query, but it is difficult to ascertain whether he disputed the principle, or the application of it to that particular case. He cites 22 H. 6, to support his query. On looking at the case, it does not appear to contradict this decision, for it is laid down by two judges *arguendo*, that a new market or ferry set up near an old one, whereby its customary profits are reduced, would be a nuisance; which is not disputed. Whether a distance of three quarters of a mile would be beyond the rights of the old ferry or not, does not appear.

I infer from these cases and others cited in the argument, that it is not the mere diminution of profits occasioned by a new ferry, which constitutes it a nuisance to the old, but to produce this effect, the new one must be established within the range of the exclusive right of the old one, which is to be settled by proof of use in the case of a prescriptive right, and by the grant, where one exists; and that such rights, being in deroga-

tion of the common right of the public, must be construed strictly. Now it is true, that until the year 1785 there was but one ferry between Charlestown and Boston; and that all passengers to and from these towns used that ferry; so that if the college rested upon prescription for the proof of its right, they may have had some claim to the exclusion of any other ferry or right of transportation, as was the case of Chadwick's ferry, and the ferry between Hull and Barton. But deriving their right under a grant from the government, which is not exclusive in its terms, they are limited to the rights conferred by the grant.

But it is said, that if the ferry right is restricted to the ferry-ways, it is of no value, for the value of the franchise depends upon tolls, and these, upon passengers, and if another ferry could be set up along side of theirs, or a bridge more especially, their franchise is destroyed.

And it must be confessed, such is the consequence of the doctrine I have advanced, if it cannot be limited by some sound rational principle, consistent with the public right of providing accommodation for the citizen, and the private rights of the corporation under their grant. I think I can discern such a principle, and it is one which, in my mind, influences and determines the case in reference to the second ground of the argument, which is founded on the supposed violation of the constitution of the United States.

I do not think that any such property is established in the college, as is contemplated in the 10th article of the declaration of rights and protected from public appropriation without provision for indemnity. The actual property is only in the toll which is earned on the bridge, and in the franchise of the bridge, which is the right to obstruct the navigable water, and to take toll of those who pass over. An act of the legislature requiring the toll taken to be paid into the public treasury, or that the bridge itself should be taken to the use of the public, or that it should be open for public use without any toll, would come within the terms of that article. But an act which only consequentially injures it, would not. Still, I think, without regard to that article, by the very principles of the constitution, and the nature of our government, the legisla-

ture are prohibited from doing other acts injurious to the property of the subject, and that the judicial power would be bound to protect the subject by declaring such acts void. Suppose, for instance, the legislature should grant the same ferry to another, prohibiting the use of it by the first grantee; there would be no pretence that this would be an appropriation to public use, and yet the second grant would be void, for the courts would declare, that the public, having parted with their right, had nothing to grant. This would be decided upon the principles of the common law, as we find them applied to the grants of the king. 2 Bl. Com. 37; 2 Rol. Abr. 191, *Prerog. U, pl.* 2. Or, if the legislature should reduce the toll, no power to do it having been reserved in the grant, the toll could nevertheless be recovered in an action at common law, on the ground that the act of the legislature was an unwarrantable interference with private property, a violation of their own contract or grant. Suppose the ferry granted for a term of years, and by another act it was made to terminate in a less time; the ferry would nevertheless be upheld by the law, during the term of the grant, upon the same ground, that the legislature had no right thus to interfere with private property, or to impair the obligation of their own contract.

This principle has been practically applied by the legislature itself in many instances. In some cases the legislature, in the grant itself, has reserved the right of declaring a forfeiture upon the breach of conditions, which otherwise could only be done by a court of law; in others, they have reserved the right of regulating or reducing the toll after a certain number of years. These provisions show the sense of the country and of the successive legislatures, that grants from the public to individuals convey rights which are not to be judged of and vacated by the grantor, unless the grant itself retains such power; if it does, then it is by consent of those who accept such grants.

Another thing seems to me to appertain to grants from the public, as well as individuals; which is, that notwithstanding it is said in the books they are to be construed strictly, and in cases of doubtful construction, in favour of the public, yet the construction is to be reasonable and consistent with its manifest

purposes and intent. It may be true, as is stated in some of the English books, that nothing is to be held to pass by implication only, as may be the case in private grants; but yet the just and equitable principle, that whatever is necessary to the profitable use of the thing granted, shall be considered as inherent in the grant, will apply as well to the public, being grantor, as to a citizen. If the public should grant the right to cut timber on public lands, without providing in the grant the means of ingress or egress over other public lands, could it be maintained that the grantee would be a trespasser in passing over such lands necessarily, in order to get at or draw out his timber?

If the doctrine of the common law in relation to grants from the king should be otherwise, I think it would not be applied to a grant from the United States or the commonwealth. It would be unreasonable and savour strongly of partiality for the government in its contests with citizens. I admit, that where the grant of the public is clear and explicit as to the thing granted, and there are general words which may by implication carry other things if the grant had been from one citizen to another, on the legal maxim that the words are to be taken most strongly against the grantor, the English rule, that nothing shall pass by implication, may apply. But as to the inherent qualities of a grant, and the construction of it in relation to the thing clearly granted and its necessary attributes, I cannot but think the rule is the same for public and private grants.

Now when the government grants a ferry or any other franchise, it unquestionably intends to grant the undisturbed use of it, so far as respects any acts of their own or of any persons acting under their authority. The very grant itself contains an implied contract or covenant to this effect. It is the very essence of the obligation. Now admitting that the grant of the government to the college gave no exclusive right of transportation of passengers &c. over Charles river between Charlestown and Boston, yet I think it gave the free and uninterrupted right of receiving toll from all persons who would, in the usual course of travel, cross that ferry, and that the government contracted not to divert the passengers into any other route, unless the public convenience and necessity should require it; and when

that should happen, that they would establish the new route, so as to do the least possible injury to the pre-existing right; but in doing this, if it were necessary to destroy the old ferry or materially and essentially to diminish its value, compensation should be made. As, for instance, should they determine that another ferry should be established within ten or twenty rods of the old one, and in consequence the profits of the old one should be reduced one half, it seems to me indemnity should be made, and if it were not, the proprietors of the old ferry might maintain an action for damages; but if it should happen that the new accommodation itself caused an increase of travel, so that the old ferry should receive its usual custom and profits, notwithstanding the establishment of the new one, there would be no ground of action, because there would be no injury: and there being no exclusive right to all the ferrying across the river, there would be nothing to complain of.

This appears to me a very reasonable doctrine; but I confess I am not able to adduce any authorities in support of it. I ground it on the principles of our government and constitution, and on the immutable principles of justice, which ought to bind governments as well as people.

It leaves to the government the right of determining what the public good requires, and gives security to the citizen against unequal contributions to that object. It maintains the faith of government in its contracts with and grants to its subjects, without restraining the proper use of power in making improvements, which change of times and circumstances may require. It does justice to the public and the citizen.

If it be said, that a compensation, founded upon the actual state of profits when the franchise is impaired, is not complete indemnity, because the proprietors have a right to calculate upon future increased profits, I answer, that actual and not speculative loss is the rule of damages upon a breach of contract between man and man, and that all the grantee can reasonably calculate upon is an indemnity for actual loss occasioned by a public improvement. It is upon this principle, I presume, that the legislature, when they granted authority to build the bridge at the place where the ferry had been kept, found it

necessary to make provision for indemnity to Harvard College; for thereby the ferry was destroyed, and this might have been considered an appropriation of the franchise belonging to the college to the public use. Had no provision been made satisfactory to the college, they could have maintained their action against the proprietors of the bridge, notwithstanding the license given by the government. The bridge would have been a nuisance, and if jurisdiction over nuisances had then existed, as now by virtue of the late act, this same process might have been maintained. So if the location of the bridge had been authorized at any other place, within the range of the ferry right as used, so that the travel would have been necessarily diverted, essentially diminishing the profits of the ferry, though this might not be an appropriation of the college franchise to public use, but only an injury consequential to the exercise of a right, yet there would be a remedy, because it would be a violation of the implied contract contained in the grant, that their franchise should not be disturbed or diminished in value, even for the public good, without making them whole; and in order to come to this conclusion, it is not necessary to suppose an exclusive right to transportation between Charlestown and Boston, but only an implied stipulation on the part of the government, that they will grant no other similar right, to the necessary and essential prejudice of the pre-existing grant.

Now it is perfectly within the reason of this principle, that another ferry or bridge might be granted between Cambridge and Boston, either from Lechmere Point or Cambridge Port to Barton's point, without making any compensation to the proprietors of the ferry, because it was not even by implication covenanted that no such grant should be made; for the utmost limits within which such covenant could be inferred are Charlestown and Boston. Cambridge and Boston are therefore excluded. So that to whatever extent the travel to Charlestown square, and so over the ferry to the northerly part of Boston, might be diverted by means of a bridge or ferry from any part of Cambridge to Boston, I think there could be no just ground of complaint. Such was the opinion of the legislature in regard to the claim of rights on the part of the proprietors of Charles river bridge when the

grants of West Boston bridge and of Canal bridge were made; therefore, when they made provision for an extension of the time of Charles river bridge in the act incorporating West Boston bridge, it ought to be considered, according to the terms of the grant itself, that it was not yielded as a matter of right, as compensation for an injury, but only as a gratuity. As such however, being founded upon an acknowledgment of a meritorious consideration, it is to have the same construction and effect as if granted as a matter of right.

It follows from this course of reasoning, to be my opinion, that such were the rights of the proprietors of the ferry, that an act passed in the year 1785, authorizing the erection of a bridge from Charlestown to Boston in the line of the present Warren bridge, having the effect, which would have been inevitable, of rendering the ferry wholly useless, would have been void, as impairing the obligation of a contract, without a proper provision for indemnity. I think that granting a free bridge any where within the range of the ferry right, without compensation, would be void upon this principle, because it would absolutely destroy the franchise of the ferry. And so the establishing a ferry or bridge at a less toll than was enjoyed by the ferry, because the effect would be the same. The remedy by action would give damages proportionate to the injury, and upon a bill in equity it would not be necessary to abate the bridge as a nuisance, if the damage was not so great as to require such a procedure.

This long discussion of the rights of the ferry may seem inappropriate, when I declare that I am not satisfied that such rights, whatever they may be, have been transferred by the college to the plaintiffs. On this point I concur with my brothers *Wilde* and *Morton*, who have expressed themselves fully upon it. But as the same reasoning will apply to the rights of the plaintiffs derived from the act of the legislature under which they erected the bridge, there is no need of repetition.

In considering this question I shall confine myself to the act itself, as the origin of the plaintiffs' right, taking the 8th section of the act of 1791, incorporating the proprietors of West Boston bridge, as a part of it, so that the franchise should be taken

to be for seventy years, instead of forty, as provided by the first act, the legislature of that year having in effect determined that it was reasonable that their charter should continue so long.

There is a very remarkable omission of any enacting clause in the statute of 1784 declaring any purpose for which the corporation was created. In the title of the act, and in the preamble to the first section, can be found the intention of the legislature. There is a difference in the proposed object of the incorporation as it appears expressed in the title and in the preamble. It is not common to recur to the title for an explanation of the act, though it is sometimes done; the preamble used to be called the key to the statute, but these keys have of late been omitted. Still, however, it is fair to consider this preamble as an enacting clause, for the sake of giving efficacy to a statute which created important rights, and which has frequently since been recognised as such by successive legislatures.

The words of the preamble are, "Believing the erecting of a bridge over Charles river *in the place where the ferry between Boston and Charlestown* is now kept, will be of great public utility, and Thomas Russell esquire and others having petitioned this court for an act of incorporation to empower them to build said bridge," therefore, &c. Section 1. creates a corporation with the name of "The Proprietors of Charles river bridge." Sect. 2. authorizes certain of the proprietors to call a meeting, for the making of by-laws, &c. Sect. 3. establishes the rate of toll, and limits the grant to forty years after the opening of the bridge. Sect. 4. prescribes the manner in which the bridge shall be built. Sect. 5. provides the annuity of 200*l.* to Harvard College, and that the bridge shall revert to and be the property of the commonwealth, saving to the college a reasonable and annual compensation, for the annual income of the ferry, which they might have received had not the bridge been erected. Sect. 6. gives three years for the building of the bridge.

The act is entitled, "An act for incorporating certain persons for the purpose of building a bridge over Charles river between Boston and Charlestown," &c.

Had there been an enacting clause in these words, without any provisions in the act tending to restrain their sense, there might have been room to contend that the proprietors were authorized to place their bridge any where between the two towns, and from thence might be inferred an intent on the part of the legislature to grant an exclusive right; but the preamble which comes after the title, and so ought to be considered as explanatory of the general words in the title, and especially as it professes to set forth the cause and the object of the grant, limits the position of the bridge to the place where "the ferry between Boston and Charlestown is now kept;" so that no authority was given to obstruct the river by a bridge in any other place between the two towns.

There is nothing in any part of the statute, from which an exclusive right to any thing beyond the limits of the bridge can be inferred. It is simply the grant of a license to build a bridge in the place prescribed, with the right to take toll from all persons and property which should pass over it during the continuance of the grant.

The legislature had the supreme control of all other parts of the river, so that any obstruction to vessels and boats other than that caused by a bridge extending across on the line of the ferry, would have been a public nuisance which any one might remove.

Further right might be granted by the legislature to obstruct the river by wharves or bridges, so that the erection of them would not be deemed public nuisances. The Warren bridge, therefore, built under the act of 1827, is not a public nuisance, for it is authorized by the sovereign power of the state to whose control the public waters belong.

But an erection which is not a public nuisance because it is authorized by the public, may be to the injury of private persons or corporations, and so become a private nuisance; as at the common law, a ferry granted by the king which is to the prejudice of an ancient ferry held by prescription, or a market which interferes with a pre-existing market. Franchises so granted will be vacated, or the proprietor of those which may be thus injured may maintain his action against the disturber,

notwithstanding he holds the patent of the king from whom such franchises are held to flow; and this, although there should be no express saving of pre-existing rights. For it is held, that although such patents usually are upon condition express, that they shall be of no injury to any other person, *Ita quod non sit ad nocumentum*, &c. yet that condition is implied, if not expressed. 2 Inst. 406; 2 Saund. 172. And this must be on the principle, that the contract created by the grant cannot be annulled or impaired by any act of the grantor; who is in such cases the king, as representing by his prerogative the public, in the same manner that our legislature does.

Now it appears to me, that this just and equitable principle is applicable to grants made by our legislature, and public faith and honour require that it should be so considered.

The legislature grant a township of land, and afterwards make another grant of the same land; this latter would be void, as before shown. So if they make a second grant of the same franchise. And by the constitution of the United States, they not only cannot annul, repeal or destroy their grant or contract, but they cannot impair its force or obligation.

Now what is the contract made by the public, by its agent, the legislature, with the proprietors of Charles river bridge?

1. They shall have a bridge for seventy years across Charles river, in *the place where the ferry between Boston and Charlestown* is now kept.

2. They shall receive during that term a toll fixed in the grant, from all passengers, carriages, &c. which go over their bridge.

At the time of making this grant there was a ferry, over which all persons were carried who had occasion to pass between Boston and Charlestown.

It must have been understood when the bridge was opened for travel, and the ferry ceased, that these passengers would pass over the bridge and pay their toll there. This toll was the consideration on which the proprietors undertook to build the bridge, and to pay the annuity provided in the act for Harvard College. Could the legislature consistently with their grant have the next year granted another bridge parallel with the

first, and opened it to public travel free of toll? The answer must be in the negative; unless they re-imbursed all the expense incurred; for this would be in effect to resume their grant, which it is agreed they could not do. In the first grant they give a right to toll from all persons who should pass the bridge, and persons going to and from Boston and Charlestown would pass the bridge and pay toll. But they afterwards provide means of transportation for the same persons, free of toll, and the necessary consequence is, that the first bridge is deserted. Now it seems to me, that by this the obligation of their contract is impaired, for that obligation is, that they will do no act whereby prejudice shall come to the first grantees. But here it will be said, that the public convenience may require the establishment of a free bridge; that the people are poor and cannot afford to pay toll; that the legislature is the judge of what the public interest requires, and it is their duty to provide for it. To all this I agree; but then I say it only varies the quality of the contract. The grant being of the bridge with the right to transport those who have occasion to go to Boston or Charlestown, the contract of the government is, that this right shall not be disturbed or impaired, unless public necessity demand, and if it shall demand, the grantees shall be indemnified.

Such a contract as this, is founded upon the principles of our constitution, as well as of natural justice, and it cannot be impaired without a violation of the constitution of the United States: and I think also it is against the principles of our state constitution.

To prevent misconception, I will add, that I apply this reasoning only to cases which come clearly within the contract which results from the grant. The grant relates only to a bridge between Boston and Charlestown, and there is no implied covenant or agreement that there shall not be another bridge between any other town and Boston; and if by reason of such other bridge the travel over Charles river bridge should be diminished and its toll reduced, the loss would be consequential upon the exercise of a public right not in any degree controlled or restrained by the prior grant.

But let us look at the act incorporating the proprietors of Warren bridge, and see whether it does or does not impair the obligation of the contract with the proprietors of Charles river bridge.

That contract I have stated to be, that they should continue a corporation for seventy years, with the right to take toll from all persons, &c. who should pass over their bridge to and from Boston and Charlestown, and that the grantors will do nothing to impair this right or diminish the value of it, unless the public convenience or necessity should require, and if such necessity arose, the grantees should be indemnified.

The act of 1827 authorizes the building of a bridge over Charles river between Charlestown and Boston, beginning at or near Harris's wharf in Charlestown, and ending upon certain new-made land in Boston: and the bridge is actually erected within from ten or fifteen rods of Charles river bridge on the Charlestown side, and about fifty rods on the Boston side. It receives the travel from Charlestown square, which before this act discharged itself by one avenue only, over Charles river bridge, and it conveys the passenger in a direct line to the market place in Boston, which was a principal object of travellers over Charles river bridge. The necessary and unavoidable consequence is, the taking from Charles river bridge a large portion of its toll, and giving it to the proprietors of Warren bridge to re-imburse them for the expense of erecting their bridge. It is an admitted fact, that from one half to two thirds of the toll of Charles river bridge has been withdrawn.

There is nothing in the act which bears a semblance of indemnity to the proprietors of Charles river bridge, but the reduction of the annuity to the university; but this can have no effect, for, in the first place, it falls vastly short of indemnification, and then the government, as contractor, would have no right to be its own measurer of damage.

I make no account of the offers made by the proprietors of Charles river bridge to make such alterations, additions and improvements as might comport with the supposed demands of public convenience or necessity. It was certainly within the discretion of the legislature to accept or reject their offers. If

they came to the determination that the new bridge was necessary, or that the safety or convenience of the people required it, they might build it at the public expense, or authorize individuals or a corporation to do it. Not, however, in my opinion, without an indemnity agreed upon, or some constitutional provision to assess it, because it directly trenches upon the income and profits of the old bridge, and not merely as a consequence of alterations or improvements not in themselves affected by any previous contract.

By this course of reasoning my mind is brought to the conclusion, that the act incorporating the proprietors of Warren bridge, in so far as it authorizes, and by its necessary operation occasions the diversion of travel and toll from Charles river bridge, is void, and that the proprietors of the latter bridge are entitled to relief. In what form that relief should be awarded it is immaterial now to determine, as no decree for relief can be passed. There will be a decree against the plaintiffs, in order that they may avail themselves of the right secured by the constitution and laws, of a revision by the Supreme Court of the United States, where it is highly proper that this question, depending, as I think it does, mainly upon the constitution of the United States, should be ultimately decided.

I am aware of objections that may be made to the opinion which I have adopted, that its tendency would be to check and impede public improvements, because the public will not encourage them if they should be subject to the expense of reimbursing those who suffer. But this evil cannot be very extensive within the limitations which I have suggested ; certainly less than if it is to be understood, that the legislature, having made a grant of a franchise, may directly or indirectly resume or impair it.

It will be said also, that it is contrary to the policy and practice of the commonwealth to make reparation for losses occasioned by turnpike roads, bridges, canals, &c. except for property actually taken for their use. I should answer that no case like the one before us has occurred. In those which most resemble it, such as West Boston bridge, Chelsea bridge, Beverly bridge, Haverhill bridge, &c. an indemnity probably satisfactory to the parties, has been provided for.

There are others of a strong character which have been left without indemnity; the most extraordinary of which is the case of South Boston bridge, which has been entirely destroyed by the free bridge from South Boston to Boston. There is reason to believe, however, that the persons principally interested, acquiesced in, if they did not assist to procure the grant of the free bridge. At any rate, there does not appear to have been any remonstrance to the legislature by the proprietors of South Boston bridge.

There is another feature of the act of 1827, which may render its validity, in opposition to the rights of the proprietors of Charles river bridge, at least doubtful. It provides, that the bridge shall be surrendered to and become the property of the commonwealth in six years from the time of its being opened, or sooner if before that time the proprietors shall have been re-imbursed the expense of building it, with interest at five per cent. The real effect of this provision is, that the bridge is built for the commonwealth, the proprietors merely advancing the expense, which is to be repaid out of the tolls collected. When this purpose shall be answered, the bridge becomes public property, without any provision for any toll, so that unless some further act of legislation takes place, it will be a free bridge. Now a free bridge so near to the old bridge, it must be obvious to every one, will entirely destroy all beneficial use of the franchise to the proprietors of Charles river bridge. And as there cannot exist a public necessity to give free passage to all people from Charlestown to Boston, such a bridge cannot but be a violation of the contract with those proprietors; which certainly is, that nothing shall be done by the government to impair that contract, but from necessity.

But suppose the legislature had the right to establish a free bridge, deeming it to be for the public interest and convenience; then it seems to me, that such a measure would be a virtual assumption of the franchise, and, without compensation, would be void on the principles of both constitutions.

On the other hand, suppose the toll will be continued as long as the charter of the old bridge endures; then if it shall be paid into the public treasury as a revenue to the state, this

revenue would arise from the very act which causes the loss and injury to the proprietors of Charles river bridge.

I do not, however, rest my opinion on this extraordinary provision, because if the act is held valid on the other grounds, this may be cured by future acts of legislation ; or it may be the subject of future adjudication.

I think this question of the necessity of indemnifying the proprietors of Charles river bridge has been prejudiced by the well known fact, that the profits of the bridge have been great beyond the example of any similar institution in this country. It seems to me that if the legislature of 1787, which is one year after the building of the bridge, when its success could be only conjectural, and the experiment of its durability was scarcely tried, had incorporated this company to build the Warren bridge, without indemnifying the proprietors of the old bridge, the opinion of its injustice would have been universal.

I cannot see that the principle can be affected by any change of circumstances. Every thing was prospective, and forty years at first, and afterwards seventy, were thought to be a reasonable limitation of the grant, and the question of loss and gain on both sides was merged in this compact.

If the legislature were to grant a township of land without any reservation, at ten cents per acre, and the purchaser should, by reason of a sudden settlement of the surrounding country, or on account of its favourable position for trade, or its remarkable commodiousness for mills, find it was worth as many dollars, the most ignorant man in the country would stare if the legislature should undertake to resume or curtail its grants.

Besides, notwithstanding the original proprietors and their estates may have been vastly more than indemnified, it is to be considered, that the property in a bridge is a marketable commodity ; that it finds its money value, as other commodities do ; and that the supposed pledged faith of the government in its continuance for the specified time, forms an essential ingredient in the value. It may be presumed, therefore, that many of the present holders are purchasers at a price which will enable them to obtain nothing more than the common rate of nterest. A deduction of two thirds of the value of the capi-

tal therefore must be a most serious injury. And then again, probably creditors have taken it at the market price, or heirs have taken their portions and lost their right to a new division of the estate. All will see then, that the great profits which have been derived, can have influence upon the question of right.

*Bill dismissed.**

See *Enfield Toll Bridge Co.* v. *Connecticut River Co.* 7 Connect. R. 28.

Trials.

L65824 vol.16.

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L65824 vol.16